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TRANSCRIPT OF RECORD.

16.

SUPREME COURT OF THE UNITED STATES.

No. ~~847~~ 138

THE MAYOR AND ALDERMEN OF THE CITY OF DAVENPORT, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES EX REL. RUFUS L. LORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

Dismissed

FILED DECEMBER 11, 1868.

Motion to quash writ of error allowed
Jno Sharpe

16

SUPREME COURT OF THE UNITED STATES.

No. 347.

THE MAYOR AND ALDERMEN OF THE CITY OF DAVENPORT, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES EX REL. RUFUS L. LORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

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1 Be it remembered that at a Circuit Court of the United States for the district of Iowa, begun and holden at the city of Des Moines, in said district, on the 15th day of Oct., A. D. 1867, the following petition was filed, in words and figures following, to wit:

THE UNITED STATES ON THE RELATION OF
Rufus L. Lord
vs.
THE MAYOR & ALDERMEN OF THE CITY
of Davenport.

To the judge of said Circuit Court:

Rufus L. Lord, who avers that he is a citizen of the State of New York, comes and gives this court to be informed that on the 15th day of May, 1867, by the judgment and consideration of this court, upon due process of law he recovered against the city of Davenport judgment for the sum of $63,509 68, and costs taxed at $30 65, with ten per cent. interest from the date of said judgment.

That said city of Davenport is a municipal corporation created by and a citizen of the State of Iowa; that its municipal affairs are controlled and managed by a mayor and aldermen, who perform all the duties of said corporation in relation to levying and collecting taxes and paying the debts of the corporation.

That execution has been issued on said judgment and re-
2 turned, no property [no property] found.

That the said city of Davenport has no property subject to execution out of which said judgment can be collected.

That said judgment $34,000 was for the principal of forty-six (46) bonds issued by the city of Davenport for subscription to the stock of the Mississippi & Missouri Railroad Company in the year 1853 & 1854. The sum of $22,390 75 dollars was for interest on said bonds.

The balance of said judgment was for interest on certain bonds of said city of Davenport, issued in the year 1857, under a vote of the people to borrow two hundred thousand dollars for various city improvements.

That said mayor and aldermen were empowered by an act of the legislature of Jan'y 22, 1855, whenever there was a deficiency in the ordinary revenue of the city after the payment of the ordinary city expenses, to levy a specific tax upon the assessment roll of the current year to pay the said railroad bond debt and interest.

That the ordinary revenues of said city of Davenport have ever since the year 1861 (the year the said city first neglected to pay its interest on the bonds) been consumed in the payment of the ordinary city expenses.

That no interest has been paid on said railway bonds since 1861, and the principal now due and is not paid.

3 That as to the interest on said bonds for city improvements, issued in 1857, the said city was authorized to issue the same under section 7 of the said act of January 22, 1855, which provided that the city council might borrow money and issue bonds which

should be binding on the said city, provided, that no debt should be created the yearly interest of which, with any interest drawing debt previousiy created, should exceed three-fourths of the ordinary revenue, unless the contracting of the debt should be approved by a majority of the said city, which the relator avers was done in the case of said bonds for [for] city improvements, on which he has recovered judgment.

The relator avers that the principal debt of the city of Davenport is $75,000, issued to aid the building of the Mississippi & Missouri railroad; $59,000 for city improvements under the loan voted in 1856; and $117,000 under a loan for city improvements voted in 1857, making a total of $251,000, of which the yearly interest is $25,100.

That the mayor and aldermen of said city have been, since 1861, and now are authorized to levy a specific tax to pay said railway bonds and interest when the ordinary revenue was used for ordinary expenses, which has always been the case; and a general tax
4 of five mills on the valuation by the city charter, and by the 9th section of the amendment of said city charter of Jan'y 22, 1855, a general tax of ten mills on the dollar and one mill on the dollar as a sinking fund for its bond debt confered in the general city corporation act of 1851, still in force.

That the valuation of said city as assessed has varied since the year 1861 from three to five millions of dollars, which latter sum is the valuation for the year 1867.

That said assessed valuation has never exceeded one-half the real cash valuation of the city property, and said property in said city was and is subject to taxation at its real cash value.

That it was the duty of said mayor and aldermen ever since the year 1861 to levy a specific tax to pay the interest on said railroad bonds, which would amount to seven thousand five hundred dollars a year less delinquents, a tax of one mill on the property subject to taxation as a sinking fund to pay the principal of said bonds, which upon the assessed value would amount to four thousand dollars a year less delinquents, and upon the real value subject to taxation would amount to eight thousand dollars a year less delinquents; and
5 of ten mills on the dollar for general purpose, which, after paying the ordinary city expenses, (for which five mills on the dollar is sufficient,) would amount to twenty thousand dollars a year upon the assessed value, and upon the real amount subject to taxation sixty-thousand dollars, whereas the whole amount on the city debt since 1863 has not exceeded twenty-five thousand one hundred dollars per annum.

The said mayor and aldermen have not since said interest became delinquent levied a general tax exceeding five mills on the dollar.

The relator has made a demand on the mayor and aldermen of the city of Davenport to levy a tax sufficient to pay said judgment, and they have neglected so to do.

Your relator is without any adequate remedy at law, and he prays for a writ of mandamus to the mayor and aldermen of said city com-

manding them to levy and collect upon the assessment roll of the year 1867 a special tax to pay the interest on said railway bonds, as specified in said judgment, to levy and collect a special tax of one mill on the dollar on the assessment of 1867, as a sinking fund to apply on the principal of said bonds in said judgment now
6 due. These two levies, after deducting delinquents, will amount to ten or eleven thousand dollars, which, when applied to said judgment, will leave a balance of nearly fifty thousand dollars. That to pay the balance of said judgment the said writ may command the said mayor and aldermen to cause the real and personal property to be assessed for the year 1868 at its real cash value, and upon such cash value to levy and collect a specific tax over and above five mills on the dollar, for ordinary city purposes of five mills on the dollar, and a specific tax sufficient to pay the balance of interest on said railway bond debt, amounting to $22,390 75, and a specific tax of one mill on the dollar as a sinking fund to apply on the principal of said railway bonds included in said judgment.

That the said mayor and aldermen be commanded to levy and collect said tax on the valuation of 1867, and apply the same on said judgment; to levy and collect said taxes on the real cash valuation of the property in said city for the year 1868, and apply the same in payment of said judgment, and that if any balance is due thereon of principal or interest, they be commanded to continue said
7 levies yearly and apply them when collected, until the principal and interest and costs of said judgment is fully paid.

RUFUS L. LORD.

STATE OF IOWA, *Scott County, ss*:

I, James Grant, do state on oath that I am relator's att'y; that I am conversant with the facts herein stated, and the same are true, as I verily believe.

JAMES GRANT.

Subscribed and sworn to by James Grant, before me and in my presence, this 3d day of Sept., A. D. 1867.

[NOTARIAL SEAL.]

S. F. SMITH,
N. P., Scott Co., Iowa.

Filed Oct., 1867.

W. G. WOODWARD, *Clerk.*

8 And afterwards, to wit, on the 16th day of October, A. D. 1867, the following order of court was made and entered of record, to wit:

UNITED STATES EX REL. RUFUS L. LORD
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Davenport.

This cause now comes on to be heard, Grant for plaintiff. The plaintiff files his information and affidavit for mandamus, and the court orders that the alternative writ of mandamus issue as prayed by plaintiff, returnable at the next term of this court.

And afterwards, to wit, on the [on the] 6th day of November, A. D. 1867, a writ of alternative mandamus was issued, in words and figures following, to wit:

The United States of America to the mayor and aldermen of the city of Davenport:

Whereas it has been represented to our Circuit Court of the United States for the district of Iowa that the city of Davenport is a municipal corporation created by and a citizen of the State of Iowa, and that Rufus L. Lord is a citizen of the State of New York; that on the 15th day of May, A. D. 1867, by the judgment and consideration of this court, upon due process of law, he recovered against the city of Davenport judgment for the sum of $63,509 68 dollars and costs, taxed at $30 65, with ten per cent. interest from the date of said judgment.

That said city of Davenport is a municipal corporation created by and a citizen of the State of Iowa; that its municipal affairs are controlled and managed by a mayor and aldermen, who perform all the duties of said corporation in relation to levying and collecting taxes and paying the debts of the corporation.

That execution has been issued on said judgment and returned no property found; that the said city of Davenport has no property subject to execution out of which said judgment can be collected.

That of said judgment $34,000 was for the principal of forty-six (46) bonds issued by the city of Davenport for subscription to the stock of the Mississippi and Missouri Railroad Company, in the year 1853 and 1854. The sum of $22,390 71 dollars was for interest on said bonds.

The balance of said judgment was for interest on certain bonds of said city of Davenport issued in the year 1857, under a vote of the people to borrow two hundred thousand dollars for various city improvements.

That the mayor and aldermen were empowered by an act of the legislature of January 22d, 185[illegible], whenever there was a deficiency in the ordinary revenue of the city after the payment of the ordinary city expenses, to levy a specific tax upon the assessment of the current year to pay the said railroad bond debt and interest.

That the ordinary revenue of the said city of Davenport have ever since the year 1861 (the year the city first neglected to pay the interest on its bonds) been consumed in payment of the ordinary city expenses.

That no interest has been paid on said railway bonds since 1861, and the principal is now due and unpaid.

That as to the interest on said bonds for city improvement, issued in 1857, the said city was authorized to issue the same under section 7 of the said act of January, 1855, which provided that the city council might borrow money and issue bonds, which should be binding on the said city, provided that no debt should be created the yearly of which with any interest drawing [drawing] debts previously created should exceed three-fourths of the ordinary revenue, unless the con-
11 tracting of debt should be approved by a majority of [of] the said city, which the relator avers was done in the case of said bonds for city improvements on which he has recovered judgment.

The relator avers that the principal debt of the city of Davenport is $75,000 issued to aid the building of the Mississippi and Missouri railroad, $59,000 for city improvements under the loan voted in 1856, and $117,000 under a loan for city improvements voted in 1857, making a total of $251,000, of which the yearly interest is $25,100.

That the mayor and aldermen of said city have been, ever since 1861, and now are authorized to levy a specific tax to pay said railway bonds and interest when the ordinary revenue was used for ordinary city expenses, which has always been the case, and a general tax of five mills on the valuation by the city charter, and by the 9th section of the amendment of said city charter of January 22, 1855, a general tax of ten mills on the dollar, and one mill on the dollar as a sinking fund for its bonded debt conferred in the general city incorporation act of 1851, still in force.

That the valuation of said city, as assessed since 1861, have raised since the year 1861 from three to five millions of dollars, which latter sum is the valuation for the year 1867. That said assessed
12 valuation has never exceeded one-half the real cash valuation of the city property, and said property in said city is subject to taxation at its real cash value; that said assessment is made by the assessor of said city, and the mayor and aldermen are authorized by the charter of said city to correct the same when erroneous, and that they have heretofore neglected to perform that duty.

That it was the duty of said mayor and aldermen ever since the year 1861 to levy a specific tax to pay the interest on said railroad bonds, which would amount to seven thousand five hundred dollars a year less delinquents, a tax of one mill on the property subject to taxation, as a sinking fund to pay the principal of said bonds, which upon the assessed value would amount to four thousand dollars a year less delinquents, and upon the real value subject to taxation would amount to eight thousand dollars a year less delinquents, and of ten mills on the dollar for general purposes, which, after paying the ordinary city expenses, (for which five mills on the dollar is sufficient,) would amount to twenty thousand dollars a year less delinquent, upon the assessed value and upon the real amount subject to taxation, sixty thousand dollars; whereas the whole interest on the city debt
13 since 1863 has not exceeded twenty-five thousand one hundred dollars a year.

The said mayor and aldermen have not, since said interest became delinquent, levied a general tax exceeding five mills on the dollar.

The relator has made a demand on the mayor and aldermen of the city of Davenport to levy a tax sufficient to pay said judgment, and they have neglected so to do; that the relator is without other adequate remedy at law.

And now, therefore, we being willing that justice should be done in the premises, do command you, the said mayor and aldermen of the city of Davenport, to levy and collect, upon the assessment roll for the year 1867, a special tax to pay the interest on said railway bonds, as specified in said judgment, to levy and collect a special tax of one mill on the dollar on the assessment of 1857, as a sinking fund to apply on the principal of said bonds in said judgment now due. These two levies, after deducting delinquents, will amount to ten or eleven thousand dollars, which, when applied to said judgment, will leave a balance of nearly fifty thousand dollars; that to pay the balance of said judgment, we command you cause the real
14 and personal property to be assessed for the year 1868, at its real cash value, and upon such cash value to levy a specific tax over and above five mills on the dollar for ordinary city purposes, of five mills on the dollar, and a specific tax sufficient to pay the balance of interest on said railway bond debt, amounting to $22,390 75, and a specific tax of one mill on the dollar, as a sinking fund to apply on the principal of said railways bonds, included in said judgment; to levy and collect said tax on the valuation of 1867, and apply the same on said judgment; to levy and collect said taxes on the real cash valuation of the property in said city for the year 1868, and apply the same in payment of said judgment, and if any balance is due thereon of principal or interest, to continue taxes yearly and apply them, when collected, in payment of said judgment, until the principal and interest, and costs of said judgment is fully paid, or that you appear before our said Circuit Court, at Des Moines, at the court-house, in Polk county, on 2d Tuesday in May, A. D. 1868, to show cause why you refuse so to do.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Des Moines, this 6th day of Nov., A. D. 1867, and of 92d year of our independence.

[SEAL.] (Signed) W. G. WOODWARD, *Clerk.*

Returned and filed May 11, '68.

W. G. WOODWARD, *Clerk.*

15 And on the 29th day of October, A. D. 1867, a motion to quash alternative writ of mandamus was filed, in words and figures following, to wit:

16 In the Circuit Court of the United States for district of Iowa.

Motion to quash alternative writ of mandamus.

THE UNITED STATES ON THE RELATION OF RUFUS L. Lord
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Davenport.

Now come defendants and move to quash the alternative writ of mandamus herein, for that the said mayor and aldermen of the city of Davenport have no authority under the charter and ordinances thereof to levy a tax of one per cent., or to levy a tax of one mill as a sinking fund for its bonded debt.

R. T. McNEAL,
Att'y for City of Davenport.

Filed Oct. 27, '67.

W. G. WOODWARD, *Clerk.*

Endorsed: No. 464. U. S. ex rel. Rufus L. Lord *vs.* The mayor and aldermen of the city of Davenport. Motion filed Oct. 29, '67. Woodward, clerk. Motion overruled. R. T. McNeal, att'y for def'ts.

17 And afterwards, to wit, on the 30th day of October, A. D. 1867, the following was ordered to be made of record to wit:

Motion to quash alternative writ of mandamus.

UNITED STATES EX REL. RUFUS L. LORD
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Des Moines.

Now comes the defendant and moves the court to quash the alternative writ of mandamus, and the motion being heard, together with the arguments of counsel, it is ordered that defendant's motion be overruled.

Filed May 11, '68.

W. G. WOODWARD, *Clerk.*

18 And afterwards, to wit, on the 11th day of May, A. D. 1868, there was filed in the office of the clerk of said court a return to the alternative writ of mandamus, in words and figures following, to wit:

19 In the Cicuit Court of the United States for the district of Iowa, of the May term, A. D. 1868.

Answer or return to writ of alternative mandamus.

UNITED STATES EX REL. RUFUS L. LORD
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Davenport.

Now comes the mayor and aldermen of the city of Davenport, to show cause, &c., as in the writ of alternative mandamus hereto attached commanded, and make answer or return thereto as follows, to wit:

First. They state and show to the court that they are not bound by law to execute said writ, because the same is informal, insufficient and was improperly and illegally issued, for the reasons, as is apparent upon the face thereof:

1. For that said writ was and is issued in the name and style of "The United States of America," instead of in the name and style of the President of the United States," as required by law, and the rules of this court having reference thereto.

2. For that the said writ was and is misdirected, in that the same was and is directed to the mayor and aldermen of the city of
20 Davenport, there being no such officer, person, corporation, association or body known in law or fact.

Second. For a further answer and return to said writ said mayor and aldermen state as follows to wit:

1. They deny that the municipal affairs of the city of Davenport are managed and controlled by a mayor and aldermen, as alleged, but on the contrary, aver that said officers are managed and controlled within the limits of their powers, by a city council of said city, and that by the charter of said city the marshall is the collector of all taxes.

2. They deny that the mayor and aldermen were empowered by an act of the legislature of January 22, 1855, to levy a specific tax upon the assessment of the current year to pay said railroad bond debt and interest whenever there was a deficiency in the ordinary revenue of the city, after the payment of the ordinary city expenses as alleged, but, on the contrary, they aver that the city council of said city only were empowered by said act, whenever there was such a deficiency as alleged, to levy a specific tax upon the assessment roll of the current year to pay the semi-annual interest on the debt created prior to said act of the legislature.

They also aver that said city council have no power by law to levy any greater specific tax in any one year upon the assessment roll of that year than is sufficient to pay said semi-annual interest on said debt.

21 3. They deny that the contracting of the debt for city improvements, whereby the bonds of 1857 were issued, was approved by a majority of the said city, as alleged.

4. They deny that the mayor and aldermen of said city, or the city council, have been ever since 1861, and now are authorized to levy a specific tax to pay said railway bonds and interest, when the ordinary revenue was used for ordinary city expenses, as alleged, but, on the contrary, they aver that the city council of said city were only authorized by law to levy a specific tax to pay said semi-annual interest, when there was deficiency in the ordinary revenue to pay the same, after the payment of the ordinary city expenses, and that they were enjoined and restrained on or about June 19, A. D. 1861, and have been ever since that time, from levying or collceting any tax to pay said interest or the principal of said debt, the same being said railway bonds in consequence of the service upon them of a certain writ of injunction which they could not disobey without being guilty of contempt and liable to punishment by the State Court of Iowa in Scott co., to wit, the Dist. Court, which first obtained full and complete jurisdiction of the matters therein involved before any suit was brought by said pl'ff in this court, and from the decree of said Scott Dist. Court no appeal was ever taken a copy of which said injunction, duly certified, is hereto attached, marked exhibit A, and made a part hereof, and which said writ of injunction was made forever
22 binding upon said mayor and aldermen as to said railway bonds, by a final order and decree of the Scott county District Court of Iowa, in the suit [in the suit] in which said writ was issued, a duly certified copy of which said decree is hereto attached, marked exhibit B, and made a part hereof, and they refer to the entire record of said suit attached to suit No. 276, now pending in this court, for all the matters contained in said record annexed as exhibit A.

5. While they admit that the city council of said city of Davenport were authorized by the city charter to levy a general tax not exceeding five mills on the dollar, yet they deny that said mayor and aldermen or said city council were authorized by the 9th section of the amendment of said charter of January, 1855, to levy a general tax of ten mills on the dollar or a tax of one mill on the dollar as a sinking fund for its bond debt, under a power conferred upon the city of Davenport of the general incorporation act of 1851, as alleged; on the contrary, they aver that said mayor and aldermen, nor said city council, were authorized by law to levy no greater tax for general purposes than five mills on the dollar, and that no authority or power is given them by law to levy a tax of one mill on the dollar in addition to said five mills as a sinking fund for any purpose whatever. That the only taxes which said city council are authorized by law to levy are the said tax of five mills for general purposes authorized by the original charter of said city, the said specific tax to pay the said semi-annual interest, as provided in the 8th section of said
23 amendment to the charter of January 22, 1855, and a road tax of three mills on the dollar as authorized by a further amendment to said charter of January 23, 1857.

They further state the charter of the powers provided in the code for the organization of cities in the said general incorporation act was never adopted or sanctioned by a majority of the voters of said

city of Davenport, at any public election held for that purpose, as was provided might be done by said section 9 of said amendment of 1855, and that until an adoption of the powers provided for in said general incorporation act by the voters of said city of Davenport, has said city any further or greater power or authority, by virtue of said 9th section of said amendment than is elsewhere provided by law.

6. They deny that the valuation of said city assessment since 1861 has varied from three to five million of dollars, or that the latter sum is the valuation for the year 1867, as alleged, but on the contrary, at no time they aver since 1861 has the valuation reached the sum of five million dollars, and that for the year 1867 it was only four million five hundred ninety-two thousand four hundred and twenty-three dollars.

7. They deny that said assessed valuation has never exceeded one-half the real cash valuation of the city property, or that said property in said city is subject by law to taxation at its real cash
24 value, or that the mayor and aldermen, or city council, have neglected to perform any duty in respect to the correction of any assessment made by the assessor of said city, when erroneous or alleged, but on the contrary they aver that said assessed valuation has generally been more than one-half the real cash value, and some years very nearly equal to, if not more, than its actual cash value; that said property is not liable to taxation at its real cash value, considered as separate and distinct parcels, but only at a fair cash value considered and treated as in the aggregate; and that the city council of said city, whose duty it is by law to correct or equalize any erroneous or injudicious assessment, have always attended to and performed that duty, as required by sec. 1 of ar. five of said charter, wherein it is provided that the assessed value of all the taxable property within said city shall be ascertained by the assessor of said city.

8. They deny that it was the duty of said mayor and aldermen, or said city council, ever since the year 1861, to levy a specific tax to pay the interest on said railroad bonds, or a tax of one mill on the property subject to taxation, as a sinking fund to pay the principal of said bonds; or a tax of ten mills on the dollar; five mills on the dollar is sufficient for the ordinary city expenses, as is alleged; but on the contrary, they aver that it has never been the duty of said mayor and aldermen, or of said city council, since the year
25 1861, to levy any other tax than a tax of five mills on the dollar for general purposes, and a road tax of three mills on the dollar, both of which have always been levied.

Third. For a further answer and return to said writ, said mayor and aldermen say, that in addition to the road tax authorized to be levied by said amendments to said city charter, not less than one-half of all taxes levied by the city authorities of said city of Davenport, except the said specific tax to pay said semi-annual interest, as before stated, is required, pursuant to section four (4) of said act of the legislature of January 22, 1855, referred to in said writ, to be

expended on the streets and roads within the limits of the several districts annexed to said city by said act of January 22, 1855, and those by said act of January 23, 1857, and subsequently annexed thereto, under the control and superintendence of the street commissioner and the city council of said city, and that no discretion is left in said council as to this expenditure of one-half at least of all taxes so levied, except to expend the same upon the said streets and roads, and that they have no power or authority to divert said amount of one-half of all the taxes so levied, or apply the same to any other purpose or object whatever.

2. That the government of said city is administered by a city council, consisting of a mayor and a board of aldermen; that the other officers of said city are a clerk, marshal, chief of police,
26 engineer, street commissioner, police magistrate, wharf master, assessor and deputy collector, treasurer, city attorney, health inspector, sexton and four or more policemen; that the city has a population of about 20,000 persons, and extends over a large and part of it sparsly settled territory; that the ordinary city expenses are about as follows: expenses per annum for salaries of officers, $6,000; for the fire department, $7,000; for lighting with gas, under contract with gas co. made in 1854, $5,000; for the police department, $4,000; for health department, $1,000; for the other usual incidental expenses, such asoffice hire, fuel, stationery, printing, &c., $3,000, making a total of $26,000 per annum, all of which are necessary for the support and maintenance of the city government, for the security and protection of health and prosperity, and the general welfare of the population of the city, and for the payment of which it is the duty of the city council to provide, within the limits of their powers, before paying judgments or other debts of the city.

3. That the revenue derived from a tax of five mills on the dollar, one-half of which is required by law, absolutely and imperatively, to be expended on the streets and roads, as provided in and by said charter as amended, the balance should be and respondent are so willing to apply the same as follows, to wit:

1. To the payment of the ordinary and necessary city expenses.

2. To the payment of the semi-annual interest on the debt
27 created prior to January 22, 1855.

3. To the payment of pl'ff's judgment.

Fourth. As to the mandate of said court in said writ contained, said mayor and aldermen, for the reasons and causes hereinbefore set forth, say, as they are informed, advised and verily believe, they have no power or authority by law: 1, to levy and collect upon the assessment roll of 1867 a special tax to pay the interest on said railway bonds, as specified in said judgment, or to levy and collect a special tax of one mill on the dollar on the assessment of 1867, as a sinking fund to apply on the principal of said bonds in said judgment; or, 2, in order to pay the balance of said judgment, to cause the real and personal property to be assessed for the year 1868, at its real cash value, or to levy and collect upon such cash value a special tax over and above five mills; for ordinary city purposes a tax of five mills, and

a specific tax sufficient to pay the balance of interest on said railway bonds, amounting as alleged to $22,390 75, or a specific tax of one mill on the dollar, as a sinking fund to apply on the principal of said railway bonds included in said judgment, or to levy and collect said taxes on the valuation of 1867, and apply the same on said judgment; or to levy and collect said taxes on the real valuation of the
28 property in said city for the year 1868, and apply the same in payment of said judgment; or to continue said levies yearly until said judgment is fully paid, as commanded in said writ, except in the manner hereinbefore set forth.

Wherefore said mayor and aldermen pray the judgment of this honroable court:

1. Whether the said writ was and is not informally and not according to law issued.

2. Whether said writ was and is not misdirected, and

3. Whether said city council or said mayor and aldermen have any power or authority by law to levy any other or any greater tax upon the property in said city, and upon the valuation to be ascertained by the assessor of said city, as in said charter provided, that a general tax, not exceeding five mills on the dollar, and a specific tax sufficient to pay the semi-annual interest on the debt of said city, created prior to said amendment of January 22, 1855, when the ordinary revenue is insufficient therefor, after paying the city expenses, ordinary and necessary, and a special road tax, not exceeding three mills on the dollar; and whether not less than one-half of all the taxes levied by the city authorities of said city, not including said specific tax, to pay said semi-annual interest, and said road tax of three mills which is to be wholly expended on streets and roads, is not by law required to be expended on the streets and roads
29 in the districts annexed to said city as provided in said amendment of January, 1855, to said city charter.

4. And that said mayor and aldermen may not be hence dismissed with costs.

THE STATE OF IOWA, *Scott County*, *ss* :

The mayor and aldermen of city of Davenport, by Geo. P. Whitcomb, their solicitor:

I, M. Donahue, being duly sworn, say, that I am the mayor of the city of Davenport; that I have heard read the foregoing answer or return and know the contents thereof, and that the same is true, as I verily believe.

MICHAEL DONAHUE,
Mayor of the City of Davenport.

Subscribed and sworn to before me by said M. Donahue, at the court-house in said Scott county, this 9th day of May, A. D. 1868.

J. SCOTT RICHMAN,
Judge of the 7th judicial district of the State of Iowa.

30 *Exhibit A.*

THE STATE OF IOWA, *Scott County:*

The State of Iowa to the mayor and aldermen of the city Davenport, defendant:

Whereas Willard Barrows and other, as plaintiff, ha this day filed in the office of the clerk of the District Court of Scott county aforesaid a certain petition, under oath, making the mayor and aldermen of the city of Davenport defendant therein; and whereas also, the said petition has been duly presented to the Honorable George G. Wright, judge of the Supreme Court of Iowa, for the allowance of a writ of injunction, as prayed for in said petition; and whereas the said judge made an order allowing said writ of injunction to issue, restraining said defendant in manner and form hereinafter stated, upon the filing of a bond, with sureties, pursuant to said order; and whereas the said order has been complied with, and said bond filed and approved: Now, therefore, you, the said mayor and aldermen of the city of Davenport, and each of you defendant as aforesaid, in the name and by the authority of the State of Iowa, are here strictly enjoined and restrained from proceeding in the city council of the city of Davenport, Iowa, to levy or collect from the citizens of Davenport any tax for the purpose of paying either the principal or interest of the bonded debt of said city, $50,000 of which was created to aid in building the Chicago and Rock Island railroad, $75,000
31 to aid in building the Mississippi and Missouri railroad, and the balance for other purposes, until the further order of our said District Court in the premises.

To the sheriff of Scott county:

You are herebycommanded to make due service of this writ upon said defendant, and hereof fail not, and make return of this writ unto our said District Court, with your doings thereon endorsed, on the first day of the next term of our said District Court.

Witness Ira M. Gifford, clerk of said District Court of Scott county, Iowa, and the seal of said court hereto affixed, this 10th day of June, 1861.

[L. S.] IRA M. GIFFORD,
Clerk as aforesaid.

On which the following endorsements were made:

No. 6610. W. Barrows vs. Mayor and aldermen of city of Davenport. Writ of injunction, filed June 22, '61. Gifford Clark. Rec. June 15, 1861. Geo. E. Hubbell, att'y for plaintiff. James Thorington, sh'ff. By H. H. Andreson, deputy.

Service	50
Copy	60
Mileage	10
	$1 20

Served the within writ this 19th day of June, A. D. 1861, by reading it to the mayor and aldermen of the city of Davenport in council assembled, and by deliver to them a copy of the same.

JAMES THORINGTON,
Sheriff.

32 STATE OF IOWA, *Scott County ss*:

I, M. D. Snyder, clerk of the District Court in and for said county, do hereby certify that the within is a true copy of the original writ of injunction against the mayor and aldermen of the city of Davenport, now on file in my office.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be hereto affixed at office, in the city of Davenport, in said county, this sixth day of May, A. D. 1868.

[SEAL.] M. D. SNYDER, *Clerk*.
[U. S. stamp.]

33 *Exhibit B*.

[Copy.]

WILLARD BARROWS *et al.*
vs.
THE CITY OF DAVENPORT. } Decree.

This case coming up for final hearing, Geo. E. Hubbell, esq., appeared for the plaintiff and D. L. Shorey, esq., for the def'ts.

The court being fully advisied in the premises, orders and dercees as follows: That the petition be dismissed, but without prejudice as to so much of the bonded debt as was created for the improvement of the streets.

That the injunction heretofore granted as to the bonds issued to the Chicago and Rock Island Railroad Company, and the Mississippi and Missouri Railroad Company be, and the same is made perpetual, and the said city is restrained from making any levies of taxes to pay the said railroad bonds or interest thereon; orders that the city of Davenport pay the costs of this suit; as the holders of the said bonds are not parties to this suit, this decree is not intended, and does not effect or conclude their rights in the premises, if any they have.

(Signed) JOHN F. DILLON, *Judge*.

STATE OF IOWA, *Scott County ss*:

I, M. D. Snyder, clerk of the District Court in and for said county, do hereby certify that the foregoing is a full and complete transcript of the decree in said case as the same appears of record in my
34 office.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be hereto affixed, at office, in the city of Davenport, in said county, this sixth day of May, A. D. 1868.

[SEAL.] M. D. SNYDER, *Clerk*.
[U. S. stamp.]

And on the 14th day of May, A. D. 1868, there was filed in the office of the clerk of said court a paper in the words and figures following, to wit:

35 Circuit Court of the United States for the district of Iowa.

THE UNITED STATES EX RE LORD
vs.
THE MAYOR AND ALDERMEN OF the City of Devenport.

The plaintiff, as to the allegation of said answer that the writ was not issued in the name of the President, &c., craves leave to amend the same, it being a clerical error.

And as to the alleged misdirection, the plaintiff says that by the charter of said city the mayor and aldermen are properly named as defendants, they being the officers who compose the city council, by the act incorporating said city.

GRANT, *for P'f.*

And on the 14th day of May, A. D. 1868, a demurrer to the return of the defendant to the alternative writ was filed in the office of the clerk of said court in the words and figures following, to wit:

Endorsed: 464. U. S. ex re Lord vs The mayor and aldermen of the city of Davenport. Filed May 14, '68. W. G. Woodward, clerk.

36 Circuit Court of the United States for district of Iowa.

U. S. EX RE LORD,
vs.
THE MAYOR AND ALDERMEN OF the City of Davenport.

The plaintiff demurs to the return of the defendants to said writ, and for causes of demurrer says:

1. The 1st paragraph of the 2 section of said answer.

Because it sets up matter of law and not matter of fact; if the allegations of the writ, which set out the organization of the corporation, was not correct, the defendant should have demurred.

2. It sets up no bar to the writ, because it avers that other officers besides the mayor and aldermen are connected with the levying and collection of taxes. The second paragraph of said return two, because it denies a proposition of law and raises an issue of law to be tried by the court, and not an issue of fact to be tried by a jury, and the law is against the defendants.

3. The third paragraph of said section, because, if the contracting of the debt was not approved by a majority of the voters of said city, it should have been pleaded in bar of plaintiff's judgment.

4. The fourth paragraph of said section, because it denies matter of law, and that is cause for demurrer, not answer. Because said de-

cree referred to contains a provision that "as the holders of said railroad bonds are not parties to said suit, the said decree does not affect or conclude their rights in the premises, if any they have," and it appears from said decree that the plaintiff was not a party to said proceedings, he is not bound thereby; and the same is not a bar to the relief sought. 3. The said decree does not relate in any manner to that part of the relief sought which relates to the other bonds referred to in the writ.

5. The fifth paragraph of said return. 1. Because it sets up in bar of the relief sought matters and conclusions of law, and not matters of fact, to be traversed and considered as a demurrer, does not set up the law correctly, and does not bar the relief sought.

6. That part of the 7 paragraph, as follows: "But on the contrary they aver that said assessed valuation has generally been more than one-half the real cash value, and some years very nearly equal to if not more than its actual cash value; that said property is not liable to taxation at its real cash value, considered as separate and distinct parcels, but only at a fair cash value considered and treated as in the aggregate." Because the [the] same is a legal argument and not matter of fact, to be traversed and tried by a jury. The fol-
37 lowing part of said paragraph: "And that the city council of said city, whose duty it is by law to correct or equalize any erroneous or injudicious assessment, have always attended to and performed that duty as required by the 1 of ar. 5 of said charter, wherein it is provided that the assessed value of all the taxable property within said city shall be ascertained by the assessor of said city," because such an allegation is no traverse of [of] the direct allegations of the writ.

7. The whole of paragraph 8 of said section, because it is a denial of a legal proposition, and not matter of fact, to be tried by a jury, because it does not aver the law of the case correctly, and as the same has been decided by this court.

8. The first paragraph of the third section of the return, because it sets up nothing in bar of the relief sought. 2. Because the taxes referred to in said paragraph do not refer to the one per cent. which is authorized to be levied under the code of 1851, and the amendment of said city charter, making it a part thereof, but refers only to the road tax of said city. 2. The second paragraph of said return, then, because the facts therein stated set up no bar to the relief sought. The third paragraph of said return, then, because the matters therein set forth set up no bar to the relief sought. The fourth paragraph of said return, then, because it sets up matters of law and conclusions of law and not matters of fact to be tried by a jury, and is ground of demurrer, not answer.

2. Because the law is not correctly set forth in said paragraph.

GRANT, *for P'ff.*

Endorsed: 464. U. S. ex re Lord v. The mayor and aldermen of the city of Davenport. Demurrer. Filed May 14, '68. W. G. Woodward, clerk.

38 *Order of court on demurrer.*

And afterwards, to wit, on the 27th day of May, A. D. 1868, the following was ordered of record, to wit:

THE UNITED STATES EX REL. RUFUS L. LORD
v.
THE MAYOR AND BOARD OF ALDERMEN OF City of Daveport. } No. 464 Law.

This cause came on be heard, Grant for the plaintiff, Whitcomb for the defendants. The plaintiff, on leave, amended certain formal parts of the writ. The plaintiff demurred to the defendants' return to the alternative writ. The plaintiff, on argument, abandoned his claim for the one-mill sinking fund named in the alternative writ, and struck the same out of the same.

The court, on hearing the argument, sustained the plaintiff's demurrer, and the defendant abided thereby; and the said return being held insufficient, and the defendant not making any further return, it is ordered and adjudged that a peremptory writ of mandamus issue against the defendants, as prayed for; and the defendants are ordered to pay the costs of this writ. And the defendants prayed for of error, which is allowed on their giving bond in the penal sum of five hundred dollars, conditioned as the law directs; and
39 that, upon defendants' perfecting his writ of error the issuing of the peremptory writ be suspended until further orders of this court.

And afterwards, to wit, on the 2d day of June, A. D. 1868, the following was entered of record, to wit:

UNITED STATES EX REL. RUFUS L. LORD
v.
THE MAYOR AND ALDERMEN OF THE City of Davenport. } No. 464 Law.

And now, on this day, come the defendants in open court and tender a bond in the matter of a writ of error in the above-entitled cause, with Geo. L. Davenport and F. N. Griggs as sureties, in the penal sum of five hundred dollars; and the court having inspected the said bond, and being satisfied that it is in conformity to law and the order of court herein, and that the sureties are good and sufficient, it is now ordered that said bond be approved and filed.

40 UNITED STATES EX REL. RUFUS L. LORD
vs.
THE MAYOR AND BOARD OF ALDERMEN OF THE City of Davenport.

UNITED STATES OF AMERICA, *ss*:

To Rufus L. Lord, above-named relator, greeting: You are hereby cited and admonished to be and appear at a Supreme Court of the

United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the district of Iowa, wherein the mayor and board of aldermen of the city of Davenport is plaintiff, and you, as said relator, are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 9th day of June, in the year of our Lord one thousand eight hundred and sixty-eight.

SAM. F. MILLER,
Associate Justice S. C. U. S.

STATE OF IOWA, *County of Scott, ss:*

I, Geo. P. Whitcomb, being duly sworn, depose and say that on this 12th day of June, A. D. 1868, at the city of Davenport, in said State, I served the citation written on the preceding page hereof on the said Rufus L. Lord, relator, and on James Grant, his att'y of record, by delivering to James Grant, his attorney, a true copy thereof.

GEO. P. WHITCOMB.

Subscribed and sworn to by the said Geo. P. Whitcomb, before me, this 12th day of June, A. D. 1868.

JOHN N. ROGERS,
U. S. Commissioner for the district of Iowa.

Endorsed: No. 464. R. L. Lord ex rel. v. Mayor and aldm'n, Davenport. Citation.

41 UNITED STATES EX REL. RUFUS L. LORD
vs.
THE MAYOR AND BOARD OF ALDERMEN OF THE City of Davenport.

UNITED STATES OF AMERICA, *ss:*

To Rufus L. Lord, above-named relator, greeting: You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the district of Iowa, wherein the mayor and board of aldermen of the city of Davenport is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said

Supreme Court of the United States, this 2d day of June, in the year of our Lord one thousand eight hundred and sixty-eight.

J. M. LOVE,
Judge U. S. Court.

THE STATE OF IOWA, *County of Scott, ss:*

I, Geo. P. Whitcomb, being duly sworn, depose and say that on this 22d day of June, A. D. 1868, at the city of Davenport, in said State, I served the citation within, on the preceding page hereof, on the said Rufus L. Lord and James Grant, his attorney of record in said matter, by delivering to said James Grant a true copy thereof.

GEO. P. WHITCOMB.

Subscribed and sworn to by the said Geo. P. Whitcomb, before me, this 26th day, of June, A. D. 1868.

JOHN N. ROGERS,
U. S. Commissioner for District of Iowa.

Endorsed: No. 464. Rufus L. Lord ex rel. v. Mayor and aldm'n, Davenport. Citation.

42 And on the 2d day of June, A. D. 1868, a bond was filed in the office of the clerk of said court in words and figures following, to wit:

UNITED STATES EX REL. RUFUS L. LORD
vs.
THE MAYOR AND BOARD OF ALDERMEN OF THE City of Davenport.

SUPREME COURT OF THE UNITED STATES:

Know all men by these presents: That we, the mayor and board of aldermen of the city of Davenport, as principals, and George L. Davenport and F. H. Griggs, as sureties, are held and firmly bound unto Rufus L. Lord in the sum of five hundred dollars, to be paid to the said Rufus L. Lord, his executors, or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, our successors and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this 30th day of May, A. D. 1868.

Whereas the above-bound mayor and board of aldermen of the city of Davenport hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled suit by the Circuit Court of the United States for the district of Iowa: Now, therefore, the condition of this obligation is such, that if the above-named mayor and board of aldermen of the city of Davenport shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their

plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

[SEAL.] M. DONAHUE, *Mayor*,
[SEAL.] H. A. RUNY,
[SEAL.] E. CLAUSSEN,
[SEAL.] CHS. KRUSE,
[SEAL.] G. M. MATTHER,
[SEAL.] A. N. LITTIEG,
[SEAL.] P. B. HARDING,
[SEAL.] J. M. FRIZZELL,
[SEAL.] JAMES CUNNINGHAM,
[SEAL.] THOMAS DERMODY,
[SEAL.] O. S. McNEEL,
[SEAL.] S. P. BRYANT,
[SEAL.] _____ _____,

And Board of Aldermen of the City of Davenport, Principals.

GEO. L. DAVENPORT, } *Sureties.*
F. H. GRIGGS, }

The mayor and board of aldermen of the city of Davenport, by
G. P. WHITCOMB,
Their Att'y.

43 STATE OF IOWA, *Scott County*:

I, Geo. L. Davenport, being duly sworn, say that I am worth, in real estate, over and above all my liabilities of all kinds, and over and above a homestead and all other legal exemptions, the sum of five hundred dollars, the amount specified in the above bond.

GEO. L. DAVENPORT.

Subscribed and sworn to before me, this 1st day of June, A. D. 1868.

[SEAL NOTARIAL.] GEO. P. WHITCOMB,
N. P. Scott Co., Iowa.

I hereby certify that the above bond has been signed by the mayor and board of aldermen of the city of Davenport, being signed by the mayor and all the aldermen except J. C. Conklin, esq., who is absent from the State temporally.

Witness my hand as clerk of the city of Davenport, and the seal of said corporation, this 1st day of June, A. D. 1868.

[CORPORATION SEAL.] JOHN LILLIS,
City Clerk.

Endorsed as follows: "I hereby approve of the within bond, this 2nd day of June, 1868. J. M. Love, judge, in open court of the U. S. Circuit Court for the district of Iowa."

Filed June 2, '68.

W. G. WOODWARD, *Clerk.*

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the Circuit Court of the United States for the district of Iowa, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court before you between the United States ex rel. Rufus L. Lord and the mayor and board of aldermen of the city of Davenport, a manifest error hath happened to the great damage of the said mayor and board of aldermen of the city of Davenport, as by their complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable S. P. Chase, Chief Justice of the said Supreme Court the second day of June, in the year of our Lord one thousand eight hundred and sixty-eight, and W. G. Woodward, clerk of the Circuit Court for the district of Iowa.

[SEAL.] W. G. WOODWARD, *Clerk.*

In obedience to the foregoing writ I hereto annex the accompanying transcript of the papers and record in the above-entitled cause.

W. G. WOODWARD,
Clerk C. C. U. S., Iowa.

Endorsed: Filed June 2, '68. W. G. Woodward, clerk.

No. 464. U. L. ex rel. Rufus L. Lord v. Mayor and aldermen of city of Davenport. Writ of error. (A copy of which is lodged with the cl'k of said C't Court on this second day of June, 1868, in open court, for the def't in error.) W. G. Woodward, clerk. Copy of this writ delivered Grant & Smith, 2d June, 1868.

45 Supreme Court of the United States.

THE MAYOR AND BOARD OF ALDERMEN of the city of Davenport, pl'ffs in error,
vs.
THE UNITED STATES EX REL. RUFUS L. Lord, def'ts in error.
} In error.

Of December term in the year of our Lord one thousand eight hundred and sixty-eight.

Afterwards, to wit, on the first Monday of December in this same term, before the justices of the Supreme Court of the United States,

at the Capitol in the city of Washington, comes the said mayor and board of aldermen of the city of Davenport, by G. P. Whitcomb, their attorney, and says that in the record and proceedings aforesaid there is manifest error, in this to wit, that the alternative writ of mandamus aforesaid, and the matters therein contained are not sufficient in law for the said United States ex rel. Rufus L. Lord to have and maintain his aforesaid action thereof against the said mayor and board of aldermen of the city of Davenport; that there is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said United States ex rel. Rufus L. Lord, against the said mayor and board of aldermen of the city of Davenport, whereas by the law of the land the said judgment ought to have been given for the said mayor and board of aldermen of the city of Davenport against the said United States ex rel. Rufus L. Lord; and the said mayor and board of aldermen of the city of Davenport pray that the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, &c.

G. P. WHITCOMB,
Attorney for Plaintiff in Error.

Endorsed: Supreme Court of the United States. The mayor and board of aldermen of the city of Davenport, pl'ff in error, vs. United States ex rel. Rufus L. Lord, def't in error. Assignment of errors. Filed June 2, '68. W. G. Woodward, clerk.

46 I, W. G. Woodward, clerk of the Circuit Court of the United States for the district of Iowa, hereby certify that that the foregoing pages contain a full, true and complete copy of the original papers and journal entries of said court in the case to which it refers, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof I have hereunto set my name and the seal of said court hereto affixed at the city of Des Moines, this 12th day of Nov., A. D. 1868.

[SEAL.]

W. G. WOODWARD,
Clerk C. C. U. S., Iowa.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1869.

——: o :——

THE MAYOR AND ALDERMEN OF THE CITY OF DAVENPORT, PLAINTIFFS IN ERROR,

VS.

THE UNITED STATES, EX REL., RUFUS L. LORD, DEFENDANT IN ERROR.

No. 138.

——: o :——

ARGUMENT OF WEED & CLARKE

For the Plaintiffs in Error.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1869.

——: o :——

THE MAYOR AND ALDERMEN OF THE CITY OF DAVENPORT, PLAINTIFFS IN ERROR,

VS.

THE UNITED STATES, EX REL., RUFUS L. LORD,

DEFENDANT IN ERROR.

No. 138.

——: o :——

ARGUMENT OF WEED & CLARKE

For the Plaintiffs in Error.

——: o :——

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Supreme Court of the United States.

DECEMBER TERM, A. D. 1869.

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THE MAYOR AND ALDERMEN OF THE CITY OF DAVENPORT, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES, EX REL. RUFUS L. LORD, DEFENDANT IN ERROR.

No. 138.

——: o :——

Error to the Circuit Court of the United States for the District of Iowa.

——: o :——

STATEMENT OF THE CASE.

This is a proceeding by *mandamus*, to compel the plaintiffs in error, the Mayor and Aldermen of the city of Davenport, to levy a tax for the payment of a certain judgment against the city of Davenport, in favor of the relator, Rufus L. Lord, for the sum of $63,509 68, and costs taxed at $30 65, with ten per cent. interest from date of said judgment, rendered on the 15th day of May, 1867, by the Circuit Court of the United States for the District of Iowa. To the alternative writ, the respondents made return or answer showing cause why they should not obey the same.

This return is divided into four sections, as required by the Code of Iowa, the *first* of which is substantially as follows:

I. 1. That they state and show to the court that they are not bound by law to execute said writ, because the same is informal, insufficient, and was improperly and illegally issued, for the reasons, as is apparent upon the face thereof:

1. For that said writ was, and is, issued in the name and style of "The United States of America," instead of the name and style of the "President of the United States," as required by law, and the rules of this court having reference thereto.

2. For that said writ was, and is, misdirected, in that the same same was, and is, directed to the Mayor and Aldermen of the city of Davenport, there being no such officer, person, corporation, association, or body known in law or fact.

To this portion of the return, the relator replied: 1, asking leave to amend the writ in so far as it run in the name of the "United States," instead of the name and style of "The President of the United States;" and 2, That by the charter of said city, the Mayor and Aldermen are properly named as defendants, they being the officers who compose the city council, by the act incorporating the city.

To the other *three* sections of the return, the relator demurred; and after argument, the court sustained the same—the record showing that on the argument, the relator abandoned his claim for the one mill sinking fund tax named in the writ, and struck the same therefrom. The respondents elected to stand on their demurrer, and thereupon, the return to the writ being held insufficient, and the respondents not making any further return, the court rendered final judgment against them, and awarded

a peremptory writ, "as prayed for." From this judgment, the respondents sued out a writ of error, which was allowed, which brings the case into this court.

The material allegations of the alternative writ, and of sections two, three and four of the return, with the grounds of demurrer thereto, will be found set out in the argument.

POINTS, OR ERRORS APPARENT IN THE RECORD.

The plaintiffs in error will contend, and argue in the order here stated:

I. That the court erred in sustaining the demurrer of the defendant in error, to sections two, three and four of the return to the alternative writ.

II. That the court erred in awarding a peremptory writ of mandamus, while the first section of the return was not disposed of, and without trial on the issue tendered by said section.

III. That the court erred in not quashing the alternative writ, on the issue joined on the first section of the return to said writ.

IV. That the court erred in not quashing the alternative writ, and in awarding the peremptory mandamus, "as prayed for," after the relator abandoned his claim for the one mill tax named in the alternative writ, and after the mandate of said writ had been amended by him.

V. That the court erred in rendering judgment for the defendant in error on the whole record, when the judgment should have been for the plaintiff in error.

ARGUMENT OF THE PLAINTIFF IN ERROR.

I. *That the court erred in sustaining the demurrer of the defendant in error, to sections two, three and four of the return to the alternative writ.*

By the Code of Iowa, which regulates the practice in civil cases, a general demurrer is not allowed, but the party demurring must specify the specific grounds relied upon—that is, he must point out clearly his objections to the pleading of which he complains. As a defendant may plead separately as many defences as he may have, so the plaintiff may demur to one or more of such defences. And the demurrer may be sustained in part, and overruled in part. Revision of 1860, 518. In the case at bar, the causes of demurrer assigned are confined to sections two, three and four of the return, and it must be considered and treated simply as a demurrer to those sections. That the first section was not intended to be reached by the demurrer, will be evident from the fact, disclosed by the record, that a *reply* was filed to that section.

We shall proceed now to show that the second, third and fourth sections of the return are responsive to the averments of the alternative writ—to the matter of inducement stated therein—and either deny, or set up new matter in avoidance of, the facts on which the relator's right to the writ is based. In doing this, we shall place the averments of the writ and the allegations of the answer, side by side, not only that the convenience of the court may be accommodated, but that the pertinency of the latter may be at once apparent.

THE DEMURRER TO THE RETURN.

1. *To the first paragraph of the Second Section.*

The writ avers that the "said city of Davenport is a municipal corporation, created by and a citizen of the State of Iowa; and that its municipal affairs are controlled and managed by a mayor and aldermen, who perform all the duties of said corporation in relation to levying and collecting taxes, and paying the debts of the corporation."

To these allegations the respondents answer as fol-

lows: "They deny that the municipal affairs of the city of Davenport are managed and controlled by a mayor and aldermen, as alleged; but on the contrary, aver that said affairs are managed and controlled, within the limits of their powers, by a city council of said city, and that by the charter of said city, the marshal is the collector of all taxes."

This part of the return is demurred to, for the following reasons: "1. Because it sets up matter of law, and not matter of fact. If the allegations of the writ, which set out the organization of the corporation, was not correct, the defendant should have demurred. 2. It sets up no bar to the writ, because it avers that other officers, beside the mayor and aldermen, are connected with the levying and collection of taxes."

The court will not fail, we trust, to admire the astuteness of the attorney who could conjure up such cogent reasons for demurring to an answer or return so strictly responsive to his writ. If it was material for him to allege that the affairs of the corporation were managed by certain officers, whom he was seeking to compel to perform certain acts, it was clearly legal and proper for the respondents to deny that said officers managed said corporation as alleged, and to indicate others who did possess that authority; and whether the issue thus tendered was one of law or fact, could make no possible difference.

2. *To the second paragraph of the Second Section.*

The writ avers "that the mayor and aldermen were empowered by an act of the legislature of January 22, 1855, whenever there was a deficiency in the ordinary revenue of the city, after the payment of the ordinary city expenses, to levy a specific tax upon the assessment of the current year, to pay the said railroad bond debt and interest."

To this, the respondents answer: "They deny that the mayor and aldermen were empowered by an act of the legislature of January 22, 1855, to levy a specific tax upon the assessment of the current year, to pay said railroad bond debt and interest, whenever there was a deficiency in the ordinary revenue of the city, after the payment of the ordinary city expenses, as alleged; but on the contrary, they aver that the city council of said city only were empowered by said act, whenever there was such a deficiency as alleged, to levy a specific tax upon the assessment of the current year, to pay the semi-annual interest on the debt created prior to said act of the legislature. They also aver that said city council have no power by law, to levy any greater specific tax in any one year upon the assessment roll of that year, than is sufficient to pay said semi-annual interest on said debt."

This very material portion of the return, which the court will see, is responsive to the writ, and goes to the very *gist* of the controversy, was demurred to, for this singular reason: "*Because it denies a proposition of law*, and raises an issue of law to be tried by the court, and not an issue of fact to be tried by a jury; *and the law is against the defendants.*"

This is so palpably erroneous, that we confess our inability to argue it. The absurdity is apparent on its mere statement. Suppose the return did deny a proposition of law, or raise an issue of law, to be tried by the court, did not the whole case depend upon the construction to be given to the statutes by the court? And where legal questions only were involved, and there were no dispute about the facts, how could the answer raise "issues of fact to be tried by a jury?" But then "the law is against the defendants." So the attorney for the relator decides, but, unfortunately for him, the respondents prefer the opinion of a disinterested court.

3. *To the third paragraph of the Second Section.*

The writ avers that the bonds on which the relator has recovered judgment, were issued in 1857, for city improvements, and were approved by a majority of said city, as provided by law.

This, the return, in the paragraph above indicated, denies: "They deny that the contracting of the debt for city improvements, whereby the bonds of 1857 were issued, was approved by a majority of the said city, as alleged."

To this denial of a fact alleged in the writ, and which tendered an issue of fact, the relator demurred, for the singular reason, that "if the contracting of the debt was not approved by a majority of the voters of said city, it should have been pleaded in bar of plaintiff's judgment."

The relator, to make out his title to the writ, and as inducement to its mandate, averred that the bonds on which he had obtained judgment, were issued by the corporation, with the approval of a majority of the voters of said city. This allegation of fact is denied, and thereupon he demurs. If it was material to allege this fact, it was clearly the right of the respondents to deny its truth, if they could do so, and such denial could afford no ground for demurrer. If the fact was not material, then the relator committed the first fault in pleading by setting it out in his writ; and according to the old rule, judgment should have gone against him on the demurrer. A demurrer does not lie to an answer which sets up no new matter, but merely denies the allegation of the complaint.

Smith v. Green, 2 *Sandf.*, 702.

Ketchum v. Zerega, 1 *Smith*, 557.

4. *To the fourth paragraph of the Second Section.*

The writ alleges: "That the mayor and aldermen of said city, have been, ever since 1861, and now are, authorized to levy a specific tax to pay said railway bonds and

interest, when the ordinary revenue was used for ordinary city expenses, which has always been the case, and a general tax of five mills on the valuation, by the city charter; and by the 9th section of the amendment of said city charter of January 22, 1855, a general tax of ten mills on the dollar, and one mill on the dollar as a sinking fund for its bonded debt, conferred in the general city incorporation act of 1851, still in force."

The answer to these allegations are as follows: 1. "They deny that the Mayor and Aldermen of said city, or the city council, have been ever since 1861, and now are, authorized to levy a specific tax to pay said railway *bonds and interest*, when the ordinary revenue was used for ordinary city expenses, as alleged; but on the contrary, they aver that the city council of said city were only authorized by law to levy a specific tax to pay said *semi-annual interest*, when there was deficiency in the ordinary revenue to pay the same, after the payment of the ordinary city expenses: 2, and that they were enjoined and restrained on or about June 19, 1861, and have been ever since that time, from levying or collecting any tax to pay said interest on the principal of said debt, the same being said railway bonds, in consequence of the service upon them of a certain writ of injunction, which they could not disobey, without being guilty of contempt, and liable to punishment, by the State court of Iowa in Scott county, to wit: the District Court, which first obtained full and complete jurisdiction of the matters therein involved, before any suit was brought by said plaintiff in this court, and from the decree of said Scott District Court no appeal was ever taken—a copy of which said injunction, duly certified, is hereto attached, marked Exhibit A, and made part hereof—and which said writ of injunction was made forever binding upon said Mayor and Aldermen as to said railway bonds, by a final order and decree of the Scott county Dis-

trict Court of Iowa, in the suit in which said writ was issued—a duly certified copy of which said decree is hereto attached, marked Exhibit B, and made a part hereof, and they refer to the entire record of said suit attached to suit No. 276, now pending in this court, for all the matters contained in said record, annexed as Exhibit A."

This paragraph of the return is demurred to, for the following reasons: 1. "Because it denies matter of law, and that is cause for demurrer, not answer; 2, because said decree referred to contains a provision that 'as the holders of said railroad bonds are not parties to said suit, the said decree does not affect or conclude their rights in the premises, if any they have;' and it appears from said decree that the plaintiff was not a party to said proceedings, he is not bound thereby, and the same is not a bar to the relief sought; 3. The said decree does not relate in any manner to that part of the relief sought which relates to the other bonds referred to in said writ."

That portion of the foregoing paragraph numbered one, consists: 1, of a denial of the allegations of the writ; and 2, of an averment which narrowed the issues of law presented, and was entirely responsive to the writ. It was not demurrable, especially for the reason assigned, viz: "Because it denies matter of law." The relator had alleged that the law enjoined upon the respondents the performance of certain duties; this they deny, and aver that those duties are more circumscribed; in other words, the relator tenders an issue of law, and when the respondents join in that issue, he demurs, frantically exclaiming "you can't deny a matter of law!" This portion of the return, as joining in an issue tendered by the relator, was clearly good, and the court erred in sustaining the demurrer thereto.

The portion of this paragraph numbered two, sets up a new and distinct defence, or cause for not obeying the writ,

viz: that the respondents had been previously enjoined by the State Court, from levying the taxes which they were commanded to levy and collect by the writ. The question here is, not whether the defence was a good one, but whether the respondents had the right to plead it. About this, we think, there can be no question. But even if we are mistaken in this view, we have shown that the first part of this paragraph was not demurrable; and the rule is well settled that where the demurrer goes to the whole pleading, and part of it is good, the demurrer must be overruled.

5. *To the fifth paragraph of the Second Section.*

In further response to the averments of the writ last above quoted, the return answers as follows: "That while they admit that the city council of said city of Davenport were authorized by the city charter to levy a general tax not exceeding five mills upon the dollar, they deny that said Mayor and Aldermen, or said city council, were authorized by the 9th section of the amendment of said charter of January, 1855, to levy a general tax of ten mills on the dollar, or a tax of one mill on the dollar as a sinking fund for its bond debt, under a power conferred upon the city of Davenport, by the general incorporation act of 1851, as alleged; and they aver that said Mayor and Aldermen, nor said city council, were authorized by law to levy no greater tax for general purposes than five mills on the dollar, and that no authority or power is given them by law to levy a tax of one mill on the dollar, in addition to said five mills, as a sinking fund for any purpose whatever.—"They futher state that the charter of powers provided in the code for the organization of cities, in the general incorporation act, was never adopted or sanctioned by a majority of the voters of said city of Davenport, at any public election held for that purpose, as was provided might be done by said section nine of said amendment of

1855, and that until an adoption of the powers provided for in said general incorporation act, by the voters of said city of Davenport, said city has no further or greater power or authority, by virtue of said ninth section of said amendment, than is elsewhere provided by law."

And this is demurred to, for the following reasons: 1. "Because it sets up in bar of the relief sought, matters and conclusions of law, and not matters of fact, to be traversed; and considered as a demurrer, does not set up the law correctly, and does not bar the relief sought.

A comparison of the allegations of this part of the return with the matters stated in the writ, will make apparent how responsive is the former to the statement of title contained in the writ. The writ avers that ever since 1861, and now, the mayor and aldermen were authorized to levy: 1. A specific tax to pay said railway bonds and interest; 2. A general tax of five mills on the dollar on the valuation of city property; 3. By the 9th section of the amendment to the city charter of January 22, 1855, a general tax of ten mills on the dollar; and 4. A tax of one mill on the dollar, as a sinking fund for its bonded debt, conferred in the general city incorporation act of 1851, still in force. The return *admits* the power of the city council to levy a general tax not exceeding five mills on the dollar, and denies the power to levy a general tax of ten mills on the dollar, or the tax of one mill on the dollar, as alleged. This is clearly responsive to the writ, and is but a joinder of the issue tendered by the relator, the question to be determined by the court being whether the mayor and aldermen possess the power to levy the taxes which they are commanded by the alternative writ to levy and collect. The respondents might have stopped here, but they go further, and aver, that neither mayor and the aldermen, nor the city council, were authorized by law to levy any greater tax for general purposes than five mills on the

dollar; that no authority or power is given them by law to levy a tax of one mill on the dollar, in addition to said five mills; and that the only taxes which said city council are authorized by law to levy are: 1. The said tax of five mills for general purposes, authorized by the original charter of said city: 2. The specific tax to pay the semi-annual interest, as provided in the 8th section of the amendment to the charter of January 22, 1855; and 3. A road tax of three mills on the dollar, as authorized by a further amendment to said charter of January 23, 1857. Thus, the respondents not only deny the claim made by the relator, but specify the particular taxes, which, as they understand the law, the city council are authorized to levy. It is, then, a question as to the construction of the statutes bearing on the subject, and could only properly be brought before the court by setting up in the return the view of their duties taken by the mayor and aldermen of the city. That this question may be fairly presented, the respondents further aver that "the powers provided in the code, for the organization of cities, in the general incorporation act, was never adopted or sanctioned by a majority of the voters of said city, at any public election held for that purpose, as was provided might be done by section nine of the said amendment of 1855; and that until the adoption of the powers provided for in said general incorporation act, by the voters of Davenport, said city has no further or greater power or authority, by virtue of said 9th section of said amendment, than is elsewhere provided by law." It seems to us that the mere statement of the averments of the writ on this point, and the allegations of the return in answer thereto, demonstrate, without further argument, that the court erred in sustaining the demurrer to this portion of the return. There is certainly no force in the reasons assigned as grounds of demurrer, and the demurrant can only obtain judgment for the causes

stated in the demurrer. *Wilson* v. *Mayor of New York*, 15 How. 500.

6. *To the seventh paragraph of the Second Section.*

The averments of the writ are: "That the valuation of said city, as assessed since 1861, have raised since the year 1861, from three to five millions of dollars, which latter sum is the valuation for the year 1867; that said assessed valuation has never exceeded one-half the real cash valuation of the city property, and said property in said city is subject to taxation at its real cash value; that said assessment is made by the assessor of said city, and the mayor and aldermen are authorized by the charter of said city, to correct the same, when erroneous; and that they have heretofore neglected to perform that duty."

The answer of the respondents to these allegations of fact, are as follows: "That they deny that said assessed valuation never exceeded one-half the real cash valuation of the city property, or that said property in said city is subject by law to taxation at its real cash value, or that the mayor and aldermen, or city council, have neglected to perform any duty in respect to the correction of any assessment made by the assessor of said city, when erroneous, as alleged; and [aver that said assessed valuation has generally been more than one-half the real cash value, and some years very nearly equal to, if not more, than its actual cash value; that said property is not liable to taxation at its real cash value, considered as separate and distinct parcels, but only at a fair cash value, considered and treated as in the aggregate; and that the said city council of said city, whose duty it is by law to correct or equalize any erroneous or injudicious assessment, have always attended to and performed that duty, as required by section one of article five of said charter, wherein it is provided that the assessed value of all the taxable property within

said city shall be ascertained by the assessor of said city."]

So much of the above paragraph of the return as is embraced in brackets, was demurred to, for the following reasons: 1. "Because the same is a legal argument, and not matter of fact, to be traversed by a jury; 2. "Because such an allegation is no traverse of the direct allegations of the writ."

Now, the main averments of the portion of the writ above quoted, are: 1. That the assessed valuation of said city has never exceeded one-half of the real cash value of the property; 2. That said property is subject to taxation at its *real* cash value; 3. That the mayor and aldermen are authorized to correct the assessment, when erroneous; 4. And they have heretofore neglected to perform that duty. The object of these allegations was to increase the taxable value of the property within the corporation, and thereby increase the taxes to be received from the same; and they present mixed questions of law and fact. Being so, it was necessary for the respondents to deny the same, in order to form an issue; and this they do, in language as clearly responsive to the writ as it was possible to write it. The issue is accepted, just as it was tendered; and whether it is a "matter of fact, to be traversed by a jury," or an issue of law, to be tried by the court, is not to be considered in determining on its sufficiency as a return or answer to the writ. It seems only to be necessary to place the averments of the writ and the allegations of the return side by side, to demonstrate how completely the one is the counterpart of the other, and places in issue every material fact on which the relator relies to support the writ. And this remark applies as well to other portions of the return, as to that under consideration.

7. *To the eighth paragraph of the Second Section.*

The allegations of the writ are: "That it was the duty

of the mayor and aldermen, ever since the year 1861, to levy a specific tax to pay the interest on said railroad bonds, which would amount to $7,500 a year, less delinquents; a tax of one mill on the property subject to taxation, as a sinking fund to pay the principal of said bonds, which upon the assessed value would amount to $4,000 a year, less delinquents, and upon the real value subject to taxation, would amount to $8,000 a year, less delinquents; and of ten mills on the dollar, for general purposes, which, after paying the ordinary city expenses, (for which five mills on the dollar is sufficient), would amount to $20,000 a year, less delinquents, upon the assessed value, and upon the real amount subject to taxation, $60,000; whereas the whole interest on the city debt since 1863, has not exceeded $25,100 a year."

The answer to which is: "They deny that it was the duty of the mayor and aldermen, or said city council, ever since the year 1861, to levy a specific tax to pay the interest on said railroad bonds; or a tax of one mill on the property subject to taxation, as a sinking fund to pay the principal of said bonds; or a tax of ten mills on the dollar; or that five mills on the dollar is sufficient for the ordinary city expenses, as is alleged; and they aver that it has never been the duty of said mayor and aldermen, or of said city council, since the year 1861, to levy any other tax than a tax of five mills on the dollar for general purposes, and a road tax of three mills on the dollar, both of which have always been levied."

And the ground of demurrer to this paragraph is: 1. "Because it is a denial of a legal proposition, and not matter of fact, to be tried by a jury; 2. Because it does not aver the law correctly, and as the same has been decided by this court."

Here the relator sets out in the writ his view of the legal duty of the respondents; in other words, tenders an issue of

law, and when they join in that issue, by denying his conclusions, the relator demurs, assigning as a reason that they deny a legal proposition, and do not aver the law correctly! The learned attorney who prepared the demurrer, appears to labor under the delusion that only issues of fact can be raised on the pleadings, to wit: The writ and return, and that issues of law could only be joined by a demurrer, while the truth is, that the legal questions presented by the writ, could only be put in issue by proper denials in the return or answer. This the respondents have done, not only in the paragraph of the return under immediate consideration, but throughout the second section thereof, and the court erred in sustaining the demurrer thereto.

We come now to the consideration of the third section of the return, and the demurrer thereto. This section is divided into three paragraphs, and there are separate causes of demurrer to each. This portion of the return sets up new matter, and shows how, under the respondents' construction of the law, the taxes levied and collected by the by the city council, are to be expended.

I. *To the first paragraph of the Third Section.*

This paragraph reads as follows: "That in addition to the road tax authorized to be levied by said amendments to said city charter, not less than one half of all taxes levied by the city authorities of said city of Davenport, except the said specific tax to pay said semi-annual interest, as before stated, is required, pursuant to section four of said act of the legislature of January 22, 1855, referred to in said writ, to be expended on the streets and roads within the limits of the several districts annexed to said city, by said act of January 22, 1855, and those by said act of January 23, 1857, and subsequently annexed thereto, under the control and superintendence of the street com-

missioner and the city councils of said city; that no discretion is left in said council as to this expenditure of one half at least of all taxes so levied, except to expend the same upon the said streets and roads; and that they have no power or authority to divert said amount of one half of all the taxes so levied, or to apply the same to any other purpose or object whatever."

And to this, the grounds of demurrer are: 1. "Because it sets up nothing in bar of the relief sought; 2, Because the taxes referred to in said paragraph, do not refer to the one per cent. which is authorized to be levied under the code of 1851, and the amendment of said city charter, making it a part thereof, but refers only to the road-tax of said city."

The writ required the respondent to levy and collect certain taxes, and out of the moneys thus collected, to pay the said judgment of the relator against the city of Davenport, or show cause why they refuse so to do. In obedience to this command, the respondents come into court and show that they cannot perform the acts required at their hands, for the reason that, except certain specific taxes, *not less than one-half of all taxes* levied by the city authorities of Davenport, is required by section four of the act of January 22, 1855, to be expended on the streets and roads within the limits of the several districts annexed to said city, by the said act of January 22, 1855, and those by the said act of January 23, 1857, and subsequently annexed thereto; that said taxes are to be expended under the control and superintendence of the street commissioner and the city council; that no discretion is left in said council, as to this expenditure of one-half the taxes so levied; and that they have no power or authority to divert said amount of one-half of all the taxes so levied, or apply the same to any other purpose or object whatever. The demurrer of the relator admits the truth of these allega-

tions; and admitting them to be true, the only question was, *do they present a fair legal reason for not obeying the alternative mandamus?* If true, this portion of the return does bar the relief sought. If not true, then the relator should have replied, and thus put the truth of these allegations in issue; and when thus put in issue, it would have become the duty of the court, on the trial of the cause, to have rendered a decision according to the law and facts of the case.

2. *To the second paragraph of the Third Section.*

This paragraph is as follows: "That the government of said city is administered by a city council, consisting of a mayor and a board of aldermen; that the other officers of said city, are a clerk, marshal, chief of police, engineer, street commissioner, police magistrate, wharf master, assessor and deputy collector, treasurer, city attorney, health inspector, sexton, and four or more policemen; that the city has a population of about 20,000 persons, and extends over a large, and a part of it sparsely settled, territory; that the ordinary city expenses are about as follows: Expenses per annum for salaries of officers, $6,000; for the fire department, $7,000; for lighting with gas, under contract with the gas company, made in 1854, $5,000; for the police department, $4,000; for health department, $1,000; for the other usual incidental expenses, such as office hire, fuel, stationery, printing, &c., $3,000, making a total of $26,000 per annum—all of which are necessary for the support and maintenance of the city government, for the security and protection of health and prosperity, and the general welfare of the population of the city, and for the payment of which it is the duty of the city council to provide, within the limits of its powers, before paying judgments or other debts of the city."

The cause of demurrer to this paragraph is: "Because the facts therein stated, set up no bar to the relief sought."

While we do not deem this portion of the answer as very material, or as affecting the merits of the other parts of the return, yet it is evident that the purpose of the respondents in setting out these matters, was to inform the mind of the court, as to the ordinary city expenses, which must be provided for, before paying judgments or other city debts. The relator avers in his writ, that five mills on the dollar is a sufficient tax to pay these expenses, and asks that the other five of the ten mills tax which he prays the respondents may be commanded to levy and collect, shall be applied to the payment of his judgment. It is at most but irrelevant or redundant matter, which might have been stricken out on motion, but which is not subject to demurrer. Rev. of 1860, sec. 2946, p. 533. *Nichols v. Jones*, 6 How., 355. But motions of this kind are not to be encouraged, and unless the matter thus objected to, would work some prejudice to the opposing party, the motion will not be sustained. *Malony v. Dows.* 15 How., 261; *Hynds v. Griswold*, 2 Code Rep., 47. Now, it is evident that this matter is not demurrable, and that even on motion, it would not have been stricken from the return. The court erred, therefore, in sustaining the demurrer to this paragraph of the answer.

3. *To the third paragraph of the Third Section.*

Here the allegations are as follows: "That of the revenue derived from a tax of five mills on the dollar, one-half of which is required by law, absolutely and imperatively, to be expended on the streets and roads, as provided in and by said charter as amended, the balance should be applied, and respondents are willing to apply the same, as follows, to wit:

"1. To the payment of the ordinary and necessary city expenses.

"2. To the payment of the semi-annual interest on the debt created prior to January 22, 1855.

"3. To the payment of the relator's judgment.

And this is demurred to, for the reason: "Because the matters therein set forth, set up no bar to the relief sought."

Now this paragraph is to be considered in connection with the two preceding ones, which together constitute the third section, or ground of defence, of the return; it is the construction which the respondents put upon the law defining their powers and duties; and if true, why does it not give a reason for not obeying the mandate of the writ? It is no more demurrable, for the reason assigned, than are the conclusions of law stated in the alternative writ. If true, and that was to be determined by the court on the hearing, it did "set up a bar to the relief sought." The first paragraph of this section avers that one-half of all the taxes to be levied, except the road tax, and a specific tax to pay certain semi-annual interest, was required to be expended on the streets and roads; and this third paragraph shows how the other moiety of the taxes is required by the city charter to be expended. If the court sustained this view of the statutes, then the respondents could not legally levy and collect the taxes commanded by the writ, nor pay the money over to the relator on his judgment; or, in other words, the mandate of the writ exceeded the legal measure of duty of the respondents, and they had shown a fair, legal reason why the peremptory writ should not issue.

I. *To the fourth Section of the Return.*

The fourth section of the return is embraced in a single paragraph, which reads as follows:

"That as to the mandate of said court in said writ contained, said mayor and aldermen, for the reasons and causes hereinbefore set forth, say, as they are informed,

advised and verily believe, they have no power or authority by law: 1. To levy and collect upon the assessment roll of 1867, a special tax to pay the interest on said railway bonds, as specified in said judgment, or to levy and collect a special tax of one mill on the dollar on the assessment of 1867, as a sinking fund to apply on the principal of said bonds in said judgment; or, 2. In order to pay the balance of said judgment, to cause the real and personal property to be assessed for the year 1868, at its real cash value, or to levy and collect upon such cash value, a special tax, over and above five mills for ordinary city purposes, of five mills, and a specific tax sufficient to pay the balance of interest on said railway bonds, amounting, as alleged, to $22,390 75; or a specific tax of one mill on the dollar, as a sinking fund to apply on the principal of said railway bonds included in said judgment; or to levy and collect said taxes on the valuation of 1867, and apply the same on said judgment; or to levy and collect said taxes on the real valuation of the property in said city for the year 1868; or to continue said levies yearly until the said judgment is fully paid, as commanded in said writ, except in the manner hereinbefore set forth."

This section is demurred to, for the following reasons: "1. Because it sets up matters of law and conclusions of law, and not matters of fact to be tried by a jury; and is ground of demurrer, not answer; 2. Because the law is not correctly set forth in said paragraph."

To this assignment of the cause of demurrer, like many which have gone before it in this case, we might object as being too general, and insist that it should have been disregarded by the court. Under the Code of Iowa, a demurrer is a pleading, and it must distinctly specify and consecutively number as the grounds of objection, some matter of error intended to be argued as a defect in the

pleading, and unless it does so, it shall be disregarded. Rev. of 1860, sec. 2877, page 518. But, treating the grounds of demurrer as sufficiently specific, to what do they amount? The whole case on either side is made up of conclusions of law. The relator avers in his writ, that it is the legal duty of the respondents, as officers of the corporation, to levy and collect certain taxes, and pay the same over to him in liquidation of his judgment. What is this but *his* conclusion of law? And if he may allege his conclusions, may not the respondents in answer, in like manner, allege theirs? If the answer is demurrable for this reason, is not the writ in a similar predicament, and equally demurrable? In the whole pleadings, there are but few facts disputed; and the substantial issue presented is, which construction of the statutes is the true one? This third section is nothing more than a condensed denial of the legal conclusions stated in the writ as to the power and authority of the respondents, and presented an issue which entitled them to a trial. It is true that the relator, by his attorney, objects that this section does not state the law correctly, but that was the question to be determined by the court, not by the relator or his attorney, however learned the latter may be.

We have thus at some length, and with considerable labor, gone over the whole case as presented by the writ, the return, and the demurrer thereto, and for the convenience of the court, have placed them as it were, side by by side. A careful examination will satisfy the court, we think, that the demurrer should not have been sustained, and that the court below erred in so holding.

II. *That the court erred in awarding a peremptory writ of mandamus, after judgment on the demurrer, while the first section of the return was not disposed of, and without trial on the issue tendered by said section.*

In *Chance* v. *Temple*, 1 Iowa, 179—which establishes the practice in mandamus in that State—the court say: "In answering to a writ of mandamus, as well as in showing cause as to the sufficiency of the writ, in law as in fact, and as to all subsequent proceedings, *the ordinary rules of pleading in civil actions are applicable*, except that a return as to fact should always be on oath." And it is well settled, also, that the answer or return, need contain only a full and certain answer to all the averments of the writ, *and show a fair legal reason for disobeying the alternative mandamus.*

Springfield v. *Hampden*, 10 Pick., 59.

Glasscock v. *Com'r of General Land Office*, 3 Texas, 51.

In civil actions, under the Code of Iowa, the defendant may plead one or more defences—all that he has; but each matter of defence must be pleaded separately, and each as pleaded, must constitute a good defence. Revision of 1860, secs. 2880, 2882; pages 520, 524. Under these provisions and the decision in *Chance* v. *Temple*, above cited, in the case at bar, the respondents in their return or answer to the alternative writ, set up or allege four grounds of defence, or reasons why they should not obey the writ, each ground set forth in a different and separate section or count, and numbered as required by the Code. To the second, third, and fourth sections or counts, the relator demurred, as he had a right to do, and this demurrer the court sustained. The respondents stood upon the demurrer, and refusing to answer over, the relator was entitled to judgment against them as to those portions of the return demurred to. Under the rules of practice and pleading, all this is clear.

The first section of the return, alleged a misdirection of the writ, and constituted a fair legal reason for not obeying its mandate. At common law, the return or answer would be taken as true, and the peremptory writ denied, leaving the party aggrieved to his action for a false return.

Board of Police v. *Grant*, 9 Smedes & M., 77.

Tucker v. *Iredell*, 1 Jones Law, (N. C.,) 451.

Harwood v. *Marshall*, 10 Maryland, 451.

But in Iowa, as we have shown, in proceedings by mandamus, the ordinary rules of pleading and practice in civil actions are applicable. The return or answer to the writ is no longer treated as true. Where the return merely denies the averments of title forming the inducement of the writ, an issue is formed; where the return sets up new matter in confession and avoidance of the facts alleged in the writ, the relator may demur or reply, and the case progresses until an issue is presented; and in either case that issue must be determined by the court in some legal manner, as in other civil cases. The relator, understanding the practice, replied to this section, averring that "by the charter of said city, the mayor and aldermen are properly named as defendants, they being the officers who compose the city council, by the act incorporating the city." Thus, the issue was joined as to the misdirection of the writ, and the respondents were entitled to be heard before final judgment was rendered against them; for if the return was found to be true, then the judgment must have been that the alternative writ be quashed. That this issue must have been decided in favor of the respondents, we shall attempt to demonstrate under the next assignment of error, to which the court is respectfully referred. The court erred, then, in rendering final judgment before this issue was disposed of.

THE MISDIRECTION OF THE WRIT.

III. *That the court erred in not quashing the alternative writ, on the issue joined on the first section of the return to said writ.*

The writ is directed to the "Mayor and Aldermen of the city of Davenport;" and the answer alleges that the respondents are not bound by law to execute the same, for the reason that the same is misdirected, there being no such officer, person, corporation, association, or body known in law or fact. The direction of the writ is material. In *Chance* vs. *Temple*, 1 Clarke, (Iowa,) 193, the court say: "We come now to speak of the *direction* of the writ, which we have, also, in a measure anticipated. We would only say further, that this is so material a part of the writ, and, if defective, gives to the defendant a defence so clear and simple, that too much pains cannot be taken to insure its accuracy." Tapp. on Mand., 310 to 320, and alphabetical series of directions, note q, 310 to 313. The writ should have been directed to the corporation, instead of some of its officers. In 1837, the town of Davenport was incorporated "by the name and style of the city of Davenport," and by that name given perpetual succession. By the second section of the charter, it is provided that "the inhabitants of said city, by the name and style aforesaid, shall have power to sue and be sued, to implead or be impleaded, defend and be defended, in all courts of law and equity, and in all actions whatsoever." Laws of Iowa, 1851. And it is by this name that the city contracts debts, or exercises any of the other powers conferred by the act of incorporation. It is true that the corporation acts through officers, elected by the people, whose duties are defined by the charter, but these officers are not known to the law as public officers, or liable to be sued as such. The writ should have been addressed to the corporation by its legal name—the only one by which it is known

in law—and if the agents or officers representing the legal body, had neglected or refused to obey the mandate of the writ, they might have rendered themselves personally liable to the court, as for a contempt, or for a false return. *The People* vs. *Champion*, 16 Johns, 64; *Chance* vs. *Temple*, 1 Iowa, 179. But the act required to be done, was the act of the corporation, and not of its officers, and in order to enforce it, the proceeding should have been against the corporation, instead of its officers. In *Von Hoffman* vs. *City of Quincy*, 4 Wall. 535, the proceedings were against the corporation in its corporate name, though in that case, as in this, the power to levy and collect taxes is invested in the city council. *City of Galena* vs. *Amy*, 5 Wall., 705.

But supposing that this view is erroneous, still we insist that the writ is misdirected, for the reason that the parties named therein, *as* mayor and aldermen, possess no power or authority to levy taxes, or perform any of the other requirements of the writ. The city charter, it is true, provides for a mayor and board of aldermen, and these together constitute a city council, on which all legislative power is conferred. It is the city council which is authorized to levy and collect taxes, and until organized into a legal body, as provided by the act of incorporation, the mayor and aldermen possess no such power. Laws of Iowa, 1851. The whole power of the city government is centered in the council; all the ordinances enacted run in its name; and the mayor and aldermen have duties imposed on them distinct from those exercised when sitting in council. If, then, the acts commanded by the alternative writ to be performed, *are duties enjoined by law*, they are to be done by the city council, not by the mayor and aldermen, and the writ should have been directed to that body. And it is no answer to say, that the mayor and aldermen compose the council—that they are the same individuals—for it often happens that the same person offi-

ciates in different capacities, and exercises different functions; and the writ runs against the officer or corporation, and not against the individual. *The People* vs. *Champion*, 16 Johns., 64; *Chance* vs. *Temple*, 1 Clarke, (Iowa,) 179.

We insist, then, that the writ should have been directed either to the corporation, by the name in which it is authorized to sue and be sued, or to the law-making power of the corporation, the city council, by which alone taxes can be imposed and collected. The want of the proper direction, is a substantial defect; and such defects may be taken advantage of at any time before the peremptory mandamus is awarded. On demurrer to the return, the relator will fail if his writ be substantially defective.

Commercial Bank v. *Canal Com.*, 10 Wend., 26;
The People v. *Supervisors, &c.*, 14 Barb., 52;
Canal Trustees v. *The People*, 12 Ill., 248;
The People v. *Ransom*, 2 Comst., 490.

Under the practice in Iowa, it must be remembered, the defendant answers or makes return to the alternative writ, which is virtually the first pleading in the case. The issue presented was one of law, which it was the duty of the court to determine, and on which judgment must have been rendered in favor of the respondent; and in not so determining, and quashing the writ, the court below erred.

THE WRIT SHOULD HAVE BEEN QUASHED.

IV. *That the court erred in not quashing the alternative writ, and in awarding the peremptory mandamus, "as prayed for," after the relator abandoned his claim for the one mill tax named in the alternative writ, and after the mandate of said writ had been amended by him.*

The record discloses the fact, that on the argument of the demurrer, the relator "abandoned his claim for the one-

mill sinking fund, named in the alternative writ, and struck the same out of the same;" and that after the argument was concluded, the court sustained the demurrer, and ordered that the peremptory writ issue, "as prayed for." Record, 17.

In mandamus, we think, two principles are well settled: 1. The mandate of the alternative writ, must be supported by, and not exceed in legal value, the averments of title forming the inducement of the writ, and be in conformity with the legal obligation of the defendant. (Tapp. on Mandamus 323, 326;) and the writ must be enforced in the terms in which it is issued. Tapp. 323; *Chance* vs. *Temple*, 1 Iowa, 179. 2. The court has no power to award a peremptory mandamus in a more limited or other form than the alternative. It must go in the terms of the original, with the exception that it omits the words which require the defendant to show cause, or not at all. Tapp. on Mand. 305, and authorities in note *q*.; *Ib.*, 109. and note *j*.; *Chance* v. *Temple*, 1 Iowa, 179. The action of the relator in abandoning his claim for the one-mill tax, was a confession in open court that the mandate of the alternative writ, exceeded the legal obligation of the respondents—an admission that the writ commanded the performance of an act not enjoined by law—and furnished a sufficient reason why they should not obey the writ. The respondents were required to obey the writ, or show cause. They appeared in court for this latter purpose; and that their showing was good, was admitted by the relator. The peremptory writ could not, then, issue in the terms of the original, and the latter should have been quashed. Instead of that, however, the court ordered the peremptory writ to issue "as prayed for," and this prayer included the one-mill tax as a sinking fund, (see Record, page 3,) which the relator had confessed the respondents had no power to levy and collect. And the writ must follow the

rule. Tapp. on Mand. 299, and authorities cited in note *x*; *Chance* v. *Temple*, 1 Iowa, 191. To state this point, it seems to us, is sufficient to demonstrate the error of the court, and we leave it here.

V. *That the court erred in rendering judgment for the defendant in error on the whole record, when the judgment should have been for the plaintiffs in error.*

Under this assignment, we propose to consider the substantial questions in the case. Trusting that we have satisfied the court that the demurrer was improperly sustained, and leaving it entirely out of the case, as though it had been overruled, the question is, *Do the respondents, either as mayor and aldermen, or as the City Council of Davenport, possess the power or authority, as a duty enjoined by law, to perform the acts commanded by the alternative writ?*

WHAT EACH PARTY CLAIM.

The writ commands the mayor and aldermen as follows:

1. To levy and collect upon the assessment roll for the year 1867, a special tax to pay the interest on said railway bonds as specified in said judgment;

2. To levy and collect a special tax of one mill on the dollar on the assessment of 1867, as a sinking fund to apply on the principal of said bonds in judgment;

3. To pay the balance of said judgment, to cause the real and personal property to be assessed for the year 1868, at its real cash value, and upon such cash value, to levy a specific tax, over and above five mills on the dollar for ordinary city purposes, of five mills on the dollar;

4. To levy and collect a specific tax sufficient to pay the balance of interest on said railway bond debt, amounting to $22,390 75;

5. To levy and collect a specific tax of one mill on the

dollar, as a sinking fund to apply on the principal of said railway bonds included in said judgment; and

6. To apply these taxes in payment of the judgment of the relator, and if any balance is due thereon, of principal or interest, to continue taxes yearly, and apply them, when collected, in payment of said judgment, until the principal, interest and costs of said judgment, are fully paid.

On the other hand, the respondents claim, and submit to the court, that the city council possess only the power and authority to levy and collect, upon the valuation of the real and personal property in said city, the valuation to be ascertained by the assessor:

1. A general tax not exceeding five mills on the dollar, one-half of which is to be expended on the streets and roads in the districts annexed to said city, as provided in the amendments to the city charter, approved January 22, 1855, and January 23, 1857;

2. A specific tax sufficient to pay the semi-annual interest on the debt of said city created prior to January 22, 1855, when the ordinary revenue is insufficint therefor, after paying the city expenses, ordinary and necessary; and

3. A special road-tax, not exceeding three mills on the dollar.

This, then, is the position of either party—one made in the writ, and the other in the return or answer. The relator having abandoned his claim, for the one mill-tax as a sinking fund, whether levied under the assessment of 1867 or 1868, that may be left out of the question, as it is conceded that the respondents are not authorized to levy or collect such a tax.

THE GENERAL PRINCIPLES OF LAW.

1. The writ of mandamus is a proper remedy to compel an inferior tribunal, corporation, or public officer, to *per-*

form a duty enjoined by law, and where the right of the relator to have the act performed, is clear.

Revision of 1860, sec. 3761, page 663.

Com. v. Hampton, 2 Pick., 414;

Swann v. Work, 24 Miss., 439;

The State v. Napier, Co. Judge, 7 Iowa, 425;

Ross v. Lane, 7 Smedes and M. 695;

Glasscock v. Com. of General Land Office, 3 Texas, 51;

Canal Trustees v. The People, 12 Ill., 248; and innumerable other authorities which might be cited.

2. Corporations—and particularly municipal corporations—have only such rights and powers as are expressly granted to them, or are necessary to carry into effect the rights and powers so granted.

Clark v. The City of Des Moines, 19 Iowa, 199; same case, 12 Am. Law Reg., 146.

Perrine v. Ches. and Del. Canal Co., 9 How., 172;

Augusta v. Earle, 13 Peters, 584;

Beatty v. Knowler, 4 Peters, 169;

Broughton v. Salford Water Works, 3 Barn. A. 1;

Renyon v. Lesse of Costar, 14 Peters, 129;

Dartmouth College v. Woodward, 4 Wheaton, 636;

Bank of U. S. v. Dandridge, 12 Wheaton, 64.

3. The duties and powers of officers of a municipal corporation are prescribed by statute, and every person dealing with them as such, may know, and is charged with knowledge of, the nature of these duties, and the extent of these powers.

Clark v. City of Des Moines, 19 Iowa, 199;

12 American Law Register, 146.

Bearing these principles in mind, let us proceed to inquire whether the acts required to be performed by the alternative writ, are duties enjoined by the statutes of

Iowa, upon these respondents, or whether they exceed the legal obligation imposed upon them as mayor and aldermen of the city of Davenport? If there is no legal obligation to impose and collect the taxes, or any of them, or to cause the assessments to be made, enumerated in the writ, then the duty is not enjoined by law; and the right of the relator to enforce the writ is not clear, and the peremptory writ should have been refused. We shall take up separately each act required to be performed, and demonstrate wherein each is beyond the scope of the powers conferred upon the respondents.

THE GENERAL TAX OF FIVE MILLS.

The most important command of the writ, and to which we first devote our attention, is that requiring the respondents to levy and collect upon the assessment roll of 1868, after the city property has been assessed at its real cash value, a specific tax, over and above five mills on the dollar for ordinary city purposes, of five mills on the dollar, and which, when collected, is to be applied in payment of relator's judgment. And the question is, is the corporation authorized by law to levy and collect this tax? With a view to this inquiry, we commence the examination by quoting so much of the city charter and the amendments thereto, as bear upon, and, we think, are decisive of, the question.

1. *The authority conferred by the city charter.*

The first section of the fifth article of the original act of incorporation of the city of Davenport, approved February 5, 1851, provides that "the city council shall have power and authority to levy and collect taxes upon all taxable property, real, personal and mixed, within the city, *not exceeding one-half per cent. per annum upon the assessed value thereof, which value shall be ascertained by*

the assessor of said city. * * * The city council shall have power to correct or equalize any erroneous or injudicious assessment." The second section of the same article conferred upon the council the power "to borrow money upon the credit of the city, to be used for such purposes as they may think conducive to the welfare thereof;" and it further provides that, "in all cases where the city council may borrow money, they shall provide for the payment of the interest thereof, *by setting apart a portion of the ordinary revenue, and collecting it for that purpose.* The question of borrowing money shall be submitted [to] and approved by a majority of the tax payers of said city; *Provided, that no debt shall be contracted, that the interest per annum in any one year, due thereon, shall exceed one-half the revenue derived from tax on the real estate and personal property within said city.*" Laws of 1851; Dillon's Dig. of City Ord. 38.

This was the extent of the taxing power of the city council until 1855, when an act was passed, which was approved January 22, 1855, amendatory of the city charter, and which greatly enlarged the city limits, which contained, among other provisions, the following—the only one bearing on the subject under discussion:

"SECTION 4. Said city of Davenport is hereby constituted one road district, to be under the control and superintendence of one or more street commissioners, to be appointed by said city council, who shall hold their offices during the pleasure of the city council; *and not less than one-half of all taxes levied by the city authorities*, and the road tax levied by the county authorities for road purposes against the several districts which are annexed to the city of Davenport by this act, or that may hereafter be annexed, by extending the city limits of said city, *shall be expended on the streets and roads of said annexed districts*, and all taxes levied by the county of Scott for road purposes, upon the property within the said city, shall be collected by said street commissioner or commissioners in each, whose receipt shall discharge the property or person on the county

books, from so much as he shall pay to the extent of the road tax so levied upon such property, or against such person.

"SECTION 7. The debts heretofore created, and bonds issued, by the said city of Davenport, amounting to the sum of one hundred and twenty five thousand dollars, are hereby declared legal and binding upon the said city, and the said city council shall have the right to borrow money and issue bonds, which shall be binding upon the city; *provided that no debt shall be created, the yearly interest upon which, together with the yearly interest upon any debt before created, shall exceed three-fourths of the ordinary yearly revenue,* unless the contracting of said debt shall be approved by a majority of the voters of said city who may vote upon the question to be submitted by the city council, in such manner as said city council may direct.

"SECTION 8. Whenever there is a deficiency in the ordinary revenue of the city, after the payment of the ordinary city expenses, *to pay the semi-annual interest on the debt already created,* the city council shall levy a specific tax upon the assessment roll of the current year, to pay said interest.

"SECTION 9. All the powers provided in the Code for the organization of cities, are hereby conferred on the city of Davenport.

SECTION 11. All acts and parts of acts inconsistent with the provisions of this act be, and the same are, hereby repealed."

The charter of Davenport was again amended, and the city limits further extended, by an act approved January 23, 1857, the *fourth* section of which—and the only one which affects the taxing power—reads as follows:

SECTION 4. From and after the passage of this act, it shall not be lawful for the county authorities of Scott county to levy a road tax on any property, or a road poll-tax on residents, in said city; *and the said city council is hereby authorized to levy and collect the road tax, of not more than three mills on the dollar,* on all property liable to road tax within said city, the collection and payment thereof into the city treasury, to be regulated by ordinance of the said city council."

The foregoing embrace all the amendments of the city

charter by special acts, having reference to the levying and collection of taxes by the city council; and from these provisions of the statutes, it must be evident that the only authority in this respect conferred on the legislative body of the incorporation, is:

1. To levy and collect a tax, not exceeding one-half per cent. per annum upon the assessed value of the taxable property—(act of 1851, art. 5)—not less than one-half of which shall be expended on the streets and the roads annexed to the city. (Act of 1855, sec, 4.) And that the assessed value of the property on which this tax may be levied shall be ascertained by the city assessor. (Act of 1851, art. 5.)

2. To levy and collect a specific tax upon the assessment roll of the current year, to pay the semi-annual interest on the debt created prior to 1855, whenever there is a deficiency in the ordinary revenue, after the payment of the ordinary city expenses. (Act of 1855, sec. 8.)

3. To levy and collect a road tax of not more than three mills on the dollar, which is in lieu of the road tax imposed by the county authorities. (Act of 1857, sec. 4.)

4. To correct and legalize any erroneous or injudicious assessment by the assessor.

With these provisions of the foregoing statutes standing alone, it is clear that the taxing power of the corporation is limited and confined within the boundaries therein expressed, and that the city council are not authorized to levy the five-mill tax commanded by the writ.

2. *Chapter* 42 *of the Code of* 1851 *not applicable.*

But it is claimed that the ninth section of the act of 1855, above cited, confers upon the city of Davenport, all the powers provided in the Code of 1851, for the organization of cities. What, then, are those powers? They will be found in chapter 42 of the Code, commencing with section 649. This chapter is a general act, by which cities and towns

may become incorporated by a vote of the people residing therein, and provides in section 657, that the charter, among other things, may confer upon the corporation the power "to levy and collect taxes on all property within the limits of the corporation, which by the laws of the State is not for all purposes exempt from taxation, *which tax must not exceed one per cent. per annum on the assessed value thereof*, and its collection may be enforced by such measures as may be deemed expedient, provided those measures be not more stringent and summary than those used for the collection of State or county taxes." And after the people have voted to incorporate, the charter must be submitted to, and be approved by, another vote of the people, thus placing the whole power in the hands of those who were to be taxed. Sec. 658. These powers, by the 9th section of the act of 1855, are conferred on the city of Davenport—that is, *the power is conferred upon the people composing the corporation, to so amend their special charter, as that they may authorize the city council to exercise the powers enumerated in the Code, among which is the power to levy a tax not exceeding one per cent. instead of a tax of one half of one per cent. per annum on the assessed value of the taxable property*, as was then, and is now, provided by the special act of incorporation. Chapter 42 of the Code confers no power upon any corporation on board, it merely provides a method by which the people, at their own option, may incorporate themselves, and confer power to do certain acts upon agents or officers created by themselves; and the only purpose of section nine of the act of 1855, was to empower the citizens of Davenport, who composed the corporation, if they thought proper, by a vote, to confer a similar authority upon their municipal officers. It is the authority to adopt the powers provided by the Code for the organization of cities, by the citizens of Davenport, which is thus conferred, and not an absolute power placed in the hands of the city council, by which their taxes may

be doubled, without the consent of the people. By the charter, as we have shown, the taxing power is limited and defined, and it would be monstrous to hold that the legislature intended by section nine of the act of 1855, to give to the city council the dangerous power of largely enhancing the taxes of the people without their consent.

We are confirmed in these views, by the language of section 671, which is a part of this chapter, which provides: "*The above provisions are intended only to fix limits to the power of a town or city corporation, leaving the people, if they choose, the privilege of narrowing those limits as much as may be thought desirable, or to fix other conditions in addition to those above required,*" thus showing that the legislature, in remitting to the people a part of its power, the right to create incorporations, intended to allow them to be the judge of the authority to be entrusted to their local officers, and the amount of taxation they were able and willing to bear for municipal purposes.

3. *Legislative construction.*

We are sustained in these views, also, by what must be held as legislative construction. In the new Code of 1860, chapter 51 provides for the incorporation of cities and towns. This act was passed March 13, 1858, and went into effect on the 4th of July, of that year. This act is a substitute for chapter 42 of the Code of 1851, and like it, is a general law under which cities and towns may become incorporated. Covering the whole subject matter of municipal incorporations, and being the latest expressed will of the legislature, it necessarily repeals chapter 42 of the previous code, and this is the understanding of the bench and bar of Iowa. This chapter of the Code of 1860, was supposed to apply to, and affect corporations in existence prior to its enactment; and to obviate this construction, the legislature passed an act, which was approved September 11, 1862, which permitted the citizens of incorporated

towns and cities to abandon their organizations and form new ones under the general act, the eighth section of which reads as follows:

"SEC. 8. Chapter 51 of the Revision of 1860, shall not apply to any city or incorporated town which was incorporated before the 18th day of July, 1858, except upon the adoption thereof as above provided."

If, then, the general law of 1860, did not apply to incorporated cities or towns, till adopted by a vote of the people, the inference is fair, at least, that the general incorporation act of 1851, was not intended to be forced upon the citizens of Davenport without their consent, and that the only effect of section nine of the act of 1855, is to confer upon them the power to adopt the act of 1851, if they are so disposed. We all know with what jealousy the law-making power regards municipal corporations; and this view is much more consistent with that watchful care over the public interests, which should ever characterize the legislature, than to conclude that that body imposed the power contended for upon the city officers, without consulting the people.

It must be remembered, also, that chapter forty-two of the Code of 1851, does not apply to cities and towns previously incorporated. Its whole purpose was to allow the fast growing towns and cities of Iowa, to incorporate themselves, whenever the people residing therein felt the necessity of such organization, without making application to the legislature for special charters. No town or city already incorporated could avail itself of the powers conferred by this chapter, and it is only by virtue of the ninth section of the act of 1855, that the city of Davenport could adopt the powers provided for, and confer upon its officers the increased authority which it gives. Until adopted by a vote of the people, it could not affect the corporation as then existing. We think this is made clear by subsequent legislation. The original act of incorporation, which was

approved February 5, 1851, provides in the fourth section of the seventh article, as follows:

"SEC. 4. The city council shall have power, by ordinance, to levy and collect a special tax on the holders of the lots in any street, lane, alley or block, or the side of a block fronting or lying on an alley, or part of any street, lane, avenue or alley, according to their respective fronts owned by them, for the purpose of paving and grading the sidewalks, and lighting such streets, lanes, avenues, or alley, or parts thereof."

This provision placed in the hands of the city council the absolute authority to levy and collect taxes for improving the streets and alleys, without regard to the wishes or interests of the property holders—a dangerous power, and one subject to great abuse. But section 666 of the Code of 1851, which is a part of chapter 42, provided that the charter to be adopted by the citizens, when incorporating under that chapter, might "authorize the legislative power of the town to require the property-holders of any street, or part of a street, to pave the same, or the sidewalks thereof, *whenever the owners of two-thirds of the lots in such streets, or part of a street,* petition therefor." Now, if chapter 42 of the Code of 1851, became a part of the city charter of Davenport, and conferred upon the council all the rights embraced in that chaper, by virtue of section nine in the act of 1855, without the assent of the people, as will be contended by the attorney for the defendant in error, then section four of the original charter was repealed by section 666 of chapter 42 of the Code, upon the principle that where two acts are inconsistent, the one last enacted, being the latest expression of the legislative will, repeals the former by implication.

Wood v. *The United States,* 16 Peters, 342;
Conley v. *Sup. Calhoun Co.,* 2 West Va., 416;
The State v. *Smith,* 7 Iowa, 244.
Casey v. *Harned,* 5 Iowa, 1.

But neither the legislature nor the citizens of Davenport, understood section nine of the act of 1855, as fastening upon them, chapter 42 of the Code of 1851, and thus constituting it a part of their charter, without their approval, expressed in the manner provided by that charter. The evidence of this assertion is found in the fact, that in the amendment to the city charter, approved January 23, 1857, the legislature repealed the whole of article seven of the original act of incorporation enacted in 1851, which included section four above quoted, and gave to the city council the authority to levy and collect a special tax for the improvements of the streets, &c., *when "petitioned so to do by the owners of more than half the property so to be taxed."* Now, here is a legislative admission: 1. That section four of the original charter remained in force up to the approval of the act of 1857; and 2. That chapter 42 of the Code of 1851, did not, *ipso facto*, apply to the corporation of Davenport, under the power conferred by section nine of the act of 1855, unless adopted by the constituency of the corporation, as provided in that chapter.

4. *Our view sustained by the Supreme Court.*

These views are still further confirmed by the decision of the Supreme Court, in *Clark, Dodge & Co.* v. *The City of Davenport,* 14 Iowa, 494. This case was a proceeding by *mandamus,* to compel the levy and collection of a tax to pay a judgment for interest on certain bonds issued by said city, and the main question, as stated by the court in its opinion, was: "Whether the plaintiffs, under the averments in the answer, are entitled to a specific levy to pay the full amount of the balance of the judgment, this balance being for other bonds than those issued prior to January 22, 1855." And the court unanimously held:

"The power of the city to levy and collect a tax is prescribed by § 1 of art. 5 of the city charter. By this it is provided, that 'the city council shall have power and

authority to levy and collect taxes upon all taxable property, real, personal and mixed, within said city, not exceeding one half of one per centum per annum upon the assessed value thereof.' Sec. eight of the amended charter, 1855, provides: 'That whenever there is a deficiency in the ordinary revenue of the city, after payment of the ordinary city expenses, to pay the semi-annual interest on the debt already created, the city council shall levy a specific tax upon the assessment roll of the current year, to pay said interest.' It was under this express power that the court below recognized the right of plaintiff to have the defendant compelled to levy a specific tax to pay that portion of the judgment which was for interest on the bonds issued prior to January 22, 1855, and we think the power is therein fully conferred. This legislation was evidently designed to meet this very character of indebtedness.

"*The two sections of the city charter, as above cited, contain all the powers conferred by the legislature to levy a tax to meet such an indebtedness as plaintiff's.* If it be conceded as true, that a corporation can exercise this right of taxation only in such a manner as is authorized by the power which created it, and we think this point is fully settled by the authorities, then the defendant has not the power, under its charter, to levy a special tax exceeding one half per centum on the assessed value thereof. The grant which confers the power, contains the limitation. Being thus restricted, how could its officers levy a tax which they had no authority to levy."

In the case just cited, it will be found that it was not claimed, that by virtue of section nine of the amendment of 1855, the powers embraced in chapter 42 of the Code of 1851, devolved upon the corporation; and singularly enough the same attorney appeared in that case as well as in the one at bar. He had not then progressed to his present legal position, but then claimed that section 3275 of the Code of 1860, (copied from section 1896 of the Code of 1851,) and which constitutes a part of the law regulating executions, conferred the power to levy the specific tax for which he asked. But whether contended for or not, it is not likely that the court would have held, that the cor-

poration could exercise no taxing power beyond that conferred by the special charter, if it had supposed that section nine of the act of 1855, clothed the corporation with the authority imposed by chapter 42 of the Code of 1851, as is now claimed by the defendant in error. This decision is, at least, strong negative authority in support of our views, and will be so considered, we doubt not, by this court.

5. *If the grant be doubtful, the power cannot be exercised.*

At least, there is room for doubt as to the effect and meaning of the ninth section of the act of 1855—whether it confers upon the corporation the absolute authority to increase the taxes of the people, from five mills, as provided in the act of 1851, to ten mills, without their approval; or whether it merely empowers the constituency of the corporation, by a vote, to adopt the incorporation act of 1851, and thus enhance the authority of their agents—and, as against the corporation, this doubt must be resolved in favor of the people. The rule of law is well settled, and has been repeatedly recognized by this court, that special grants of power are to be strictly construed, and where the terms of an act conferring corporate powers, fairly admit of a doubt as to whether a power burdensome to the people has been granted, it cannot be exercised.

Clark et al. v. *City of Davenport*, 14 Iowa, 494;
Perrine v. *Chesa. & Del. Canal Co.*, 9 How., 172;
Moran et al, v. *Com. of Miami Co.*, 2 Black, 722;
Douglass v. *Placerville*, 18 Cal., 643;
Beaty v. *Knowler's Lessee*, 4 Peters, 152;
The People v. *Canal Com.*, 3 Scam. 153;
The United States v. *Wigglesworth*, 2 Story, 369;
Dugan v. *Bridge Co.*, 27 Penn. State, 303.

This view of the law is set up in the fifth paragraph of the second section of the return to the alternative writ,

where the respondents state, that "the charter of the powers provided in the Code for the organization of cities," "was never adopted or sanctioned by a majority of the voters of said city of Davenport, at any public election held for that purpose, as was provided might be done by said section nine of said amendment of 1855," and that until such an adoption, the corporation posses-ed no greater taxing power than was provided in the original charter, except the road tax of three mills, as provided by the amendment to the charter of 1857.

If we have established the proposition, as we think we have, that the only effect of section nine of the act of 1855, was to confer upon the citizens of the corporation of Davenport, the power to adopt chapter 42 of the Code of 1851, and thus increase the authority of its corporate officers, and that until thus adopted, the corporation could exercise no power under it, it follows as a legal sequence: 1. That the relator, in order to make his title to the writ clear, should have alleged as a matter of inducement to the writ, the adoption of chapter 42 of the Code of 1851, by the corporation of Davenport; 2. That until so adopted, the said corporation possesses no power to levy and collect a tax of five mills on the dollar on the assessment rolls of 1867 and 1868, over and above the five mills for general city purpos-s, as commanded by the writ; and 3. That the writ having commanded the respon lents to perform acts not enjoined by law, was fatally defective, and should have been quashed.

NO POWER TO PAY OVER THE TAXES AS COMMANDED.

But suppose we are in error in the view we take of this question, and that the legal effect of section nine of the act of 1855, was to constitute chapter 42 of the Code of 1851, a part of the city charter of Davenport, and confer upon its officers absolutely all the powers contained in that

chapter, then another question presents itself. This question arises as follows: The writ commands the respondents to levy and collect on the assessment roll of 1868: 1. A specific tax, over and above five mills on the dollar for ordinary city purposes, of five mills, on the dollar; and 2. a specific tax sufficient to pay the balance of interest on said railway bond debt, amounting to $22,390 75: 3. To apply the same in payment of the relators's judgment; and 4. To continue yearly levies and collections of said taxes, and apply them when collected, till the whole of said judgment is paid. And the question is, admitting the power of the city council to levy and collect said taxes, as commanded, *is that body authorized to make payments as commanded?* We shall attempt to demonstrate that the city council possesses no such power, and that in this respect the mandate of the writ exceeds the legal obligation of the plaintiffs in error.

The city council are not empowered by the city charter to make the payments, as commanded by the writ, for the reason, *that not less than one-half of all the taxes levied by the city authorities*, except the specific tax to pay the semi-annual interest on the debt of the city created prior to 1855, *are required to be expended on the streets and roads of the several road districts annexed to said city*; and this was the law at the time a portion of the indebtedness included in the relator's judgment was contracted. As we have already shown, the first section of the fifth article of the original act of incorporation, authorized the city council to levy and collect a tax not exceeding one-half of one per cent. and this is the only taxing power conferred by that act. The amendment of 1855, greatly enlarged the limits of the corporation, taking in a large area of agricultural land, which thus became liable to the tax of one-half per cent. for city purposes; and the legislature, rightly supposing that this addition to the city's territory,

would create a necessity for the opening of new streets and roads, requiring funds for their improvement, and as if to compensate the owners of this new territory for the additional taxation thus imposed upon them, provided in the fourth section of this amendment, that "*not less than one-half of all taxes levied by the city authorities*, and the road tax levied by the county authorities for road purposes, against the several districts which are annexed to the city of Davenport by this act, or that may hereafter be annexed by extending the limits of said city, *shall be expended on the streets and roads of said annexed districts.*" This remained the law, till 1857, when, by the amendment of that year, the limits of the corporation were again extended, and by the fourth section, the power of the county authorities to levy a road tax on the property within the city boundaries, was taken away, *and the city council was authorized "to levy and collect a road tax of not more than three mills on the dollar."* And thus the law stands to this day. It is clear, then, that by the original charter and the amendments thereto, the city council can only levy and collect: 1. The tax of one-half of one per cent.; 2. The specific tax to pay the semi-annual interest on the debt created prior to the year 1855, when the ordinary revenue is insufficient, after the payment of the current expenses; 3. The road tax of not more than three mills on the dollar; and 4. That *one-half* of the tax of one-half of one per cent. is appropriated to expenditures on the streets and roads in the districts annexed to the city.

Now, suppose we adopt the construction of the other side, and admit for the sake of the argument, that the powers embraced in chapter 42 of the Code of 1851, by section nine of the act of 1855, are vested in the hands of the city council, and they are thereby authorized to levy a tax of one per cent., how does that help the case of the defendant in error? Chapter 42 repeals nothing—its only

effect is to enlarge the taxing power; not to change the appropriation of the moneys arising from the taxes levied and collected. If the relator's view is correct, the only result can be, that the city council may increase the rate of taxation, but they have no authority to apply the proceeds in any other manner than is provided by law, and the law says that one-half of this general tax shall be expended on the streets and roads. This is a positive requirement of the statute, not to be evaded, which defines and limits the duty of the corporate officers, and any violation of it, would be prevented by the courts, and render those attempting it liable personally.

It may be contended, however, that the provisions in section four of the act of 1855, requiring one-half of all taxes levied by the city authorities, to be expended on the streets and roads, should be construed to include only one-half of all *road* taxes. The fallacy of this position is at one apparent from the fact, that neither at that time nor till the passage of the amendment of 1857, *was the city council empowered to levy any road tax whatever*. The first authority to levy a road tax is given to the city council by the act of 1857, and it is then conferred in lieu of the road tax imposed by the county authorities—in other words, the act of 1857, relieved the owners of the property of the road tax which up to that time had been levied and collected by the county officers, and paid over to the city officers, and placed the power to levy a specific road tax in the hands of the corporation. Nor can it be claimed that section four of the act of 1857, repeals, either expressly or by implication, section four of the act of 1855, which thus appropriates the amount to be expended on the streets and roads. There is no express repeal of the latter section, nor is there any such inconsistency between the two, that both may not be allowed to stand. Repeals by implication are not favored, and if effect can be given to both

sections, it will be done. *Burke v. Jeffries,* 20 Iowa, 145. It our view of the law be the correct one, the one-half of one-half per cent. with the three mill tax added, would not constitute a road fund too great for a city of the size and population of Davenport, and the appropriation of those amounts for that purpose, appears reasonable and proper. If the proposition of the relator is pronounced the legal one, then we concede that a tax of the half of one per cent. with the addition of the three mill tax, making together eight mills, would seem to be a large amount for road purposes; but this is a matter for the legislature of Iowa, and with which this court, so long as its duties are confined to *construing*, instead of *making*, laws, cannot interfere.

It is clear, then, to our minds, that under the statutes controlling the corporation, and defining the duties of its officers, the city council would have no power to pay over to the relator, in liquidation of his judgment, the whole of the taxes enumerated in the writ, even if they were levied and collected; and that the relator in thus asking, and the court in thus ordering, exceeded the legal duty to perform the act resting upon the respondents.

THE SPECIFIC TAX TO PAY THE BALANCE OF INTEREST, AMOUNTING TO $22,390 75.

As already stated, the writ commands the respondents to levy and collect a specific tax sufficient to pay the balance of interest on said railway bond-debt, amounting to $22,390 75, in addition to the five mills tax. It is not claimed, as we understand, that either the special acts of incorporation of the city of Davenport, or chapter 42 of the Code of 1851, invests the city council with authority to levy and collect this tax, but the relator relies upon section 1896 of the Code of 1851, (now section 3275 of the Code of 1860,) which reads as follows:

"1896. In case no property is found on which to levy which is not exempted by the last section, or if the judgment creditor elect not to issue execution against such corporation, he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation. And if the debtor corporation issues no scrip or evidences of debt, *a tax must be levied as early as practicable, sufficient to pay off the judgment, with interest and costs.*"

This provision occurs in the chapter of the Code, regulating executions, and the question presented is, does this section apply to corporations acting under special charters, and, if so, does it enlarge the taxing powers of their officers? We need not enter into the discussion of this question here. It has already been determined by the highest judicial tribunal of the State of Iowa; it is purely a question of local statutory construction; and according to the well-settled practice of this court, the decisions of that court, in the construction of local statutes, will be recognized and followed by the Supreme Court of the United States.

Leffingwell v. *Warren*, 2 Black, 599;
McCutchen v. *Marshall*, 8 Peters, 220;
Elmendorf v. *Taylor*, 10 Wheaton, 152;
United States v. *Morrison*, 4 Peters, 124;
Nesmith v. *Sheldon*, 7 Howard, 812;
Sumner v. *Hicks*, 2 Black, 532;
Gelpecke v. *City of Dubuque*, 1 Wallace, 175.

What, then, is the decision of the Supreme Court of Iowa on this question? In the case of *Clarke, Dodge & Co.* v. *The City of Davenport*, 14 Iowa, 494, this point was fully considered, and the court held that section 3275 of the Revision of 1860, (section 1896 of the Code of 1851,) does not confer upon corporations chartered by special acts, the power to levy taxes, where such power is not

otherwise conferred by law. This decision applies with full force in this case, it having been made with reference to the charter of the City of Davenport, which corporation was a party to that as well as this case. The reasoning of that court is so cogent and conclusive on this point, that, for the convenience of this court, we insert it here. The court say:

"It is claimed in argument, however, that by section 3275 of the Revision of 1860, the court is authorized to direct a writ to issue, commanding the levy of a special tax. This section provides that 'in case no property is found on which to levy, which is not exempted by the last section, or if the judgment creditor elect not to issue execution against such corporation, he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation. And if the debtor corporation issue no scrip or evidences of indebtedness, a tax must be levied as early as possible.'

"This section is found in the Code of 1851, in a general statute relating to executions. It applies to all corporations as organized under the general statute, passed at the same time this provision was. This law was passed, however, when there was a constitutional provision in force, which prohibited the creation of corporations by special legislation, except for political and municipal purposes. It was under this constitution that the charter of the defendant was granted. The defendant is a municipal corporation, and was created by a special law; could not constitutionally exist except by special legislation; and if not, no statute, general in its provisions, could apply to it, or regulate or control its powers.

"If this general provision would control the defendant, why the necessity of an amendment of its charter giving it the power to levy a special tax to meet the interest on bonds issued prior to January, 1855? This section occurs incidentally in the chapter in relation to executions. It does not purport to be an amendment to the charter of defendant, nor does it specifically relate to corporations for city purposes. It does not clearly confer upon the defendant any such grant of power as would justify a levy of a special tax, As is pertinently asked by the court below: 'Suppose the city charter contained no power to levy and

collect a tax, would this section give the power to do it? It is too vague, indefinite and barren. Upon what property, in the case supposed, would the tax be levied? By whom collected? How would it be collected?'"

The same doctrine was established by Justice MILLER, of this court, sitting as circuit judge, in the case of *The United States, ex rel. Learned* v. *The Mayor and Common Council of the City of Burlington*, 11 Am. Law Register, 394. This was a proceeding by *mandamus*, to compel the defendants to levy a special tax for the payment of a judgment in favor of the relator. The city was incorporated by a special act, which limited the taxing power to one per centum on the taxable property of the corporation. Here, as in the case above cited, it was claimed that sections 3274, 3275, and 3276 of the Revision of 1860, (sections 1895, 1896 and 1897 of the Code of 1851,) authorized the levy of the tax asked for by the relator; but the court held, that that section did not apply to a municipal corporation acting under a special charter, and that in levying taxes such a corporation could not exceed the maximum rate specified in its charter. In his opinion, Justice MILLER says:

"Do the provisions of sections 1895, 1896 and 1897 of the Code repeal the above sections of the city charter, or do they override them when brought into question together, or is there any necessary conflict between them? There is certainly no express repeal, and the Code could not be intended by implication to repeal the section last quoted, for it was passed since the Code became the law of the land. The rule, also, is well understood, that a repeal by implication can only arise when that is the necessary inference from the impossibility that both the acts, supposed to be in conflict, can stand. If either act is to override the other, or repeal the other, certainly the later expression of the legislative will must stand, in preference to the former. But in the present case there is no such conflict. The provision of the Code can have its effect, by compelling the city council to levy a tax *so far as it has*

power to levy it. The provisions of the charter can stand, as they were intended, as a useful and just limitation of that power. * *

"That this is a sound view of the intention of the framers of the Code, is strongly to be inferred from some of its provisions on the subject of town and city corporations. Chapter 42 is devoted to providing the manner in which the citizens of a village or town may organize themselves into a corporation, and may either assume the privileges and responsibilities of towns or cities, according to the number of the population. In speaking of a town charter thus adopted, it says, § 665, that it may give powers to establish by-laws, ordinances, &c., and 'to levy and collect taxes on all property within the limits of such corporation, which by the laws of the State is not for all purposes exempt from taxation, which tax must not exceed one per cent. per annum on the assessed value thereof,' and § 669 says, that 'the preceding provisions are applicable to a town desiring to become organized as a city." Now, these are the very corporations mentioned in §§ 1895 to 1897 inclusive, of which it is said that a tax must be levied to pay a judgment covered against them. Was it meant that they should absolutely, at once, levy a tax sufficient to pay the debt, without regard to the one per cent. limitation in the previous sections? Or was it meant that they should use such taxing power as they had for that purpose, and no more? If the former is the sound construction, then the limit upon the taxing power is nugatory, and it makes no difference how strongly the legislature, or the charter adopted by the people, may forbid excessive taxation, the authorities of the city may, by resorting to the power to make contracts, impose upon the property holders a tax unlimited in amount or duration."

Appended to this decision, as published in the Register, is a note from Chief Justice DILLON, of Iowa, supporting the doctrine laid down in the text, and citing authorities, to which we beg leave to refer the court. The case of *Burke v. Jeffries*, 20 Iowa, 145, is also somewhat analagous to the case at bar, in which the court held, that section 1123 of the Revision of 1860, which is a part of the general incorporation act, applies only to towns and cities

organized under the general law, and to those which may adopt it, and not to corporations acting under special charters; and this case and *Clark et ol. v. The City of Davenport*, 14 Iowa, 494, above cited, are the only decisions of the Supreme Court of that State, bearing upon the question. It may be claimed in this case, however, as it has been in others, that the Supreme Court have made conflicting decisions upon this subject; and if so, the cases which will be cited are, *Coy v. The City Council of Lyons*, 17 Iowa, 1, and *Porter v. Thomson et al.*, 22 Ib., 391. We propose to show, therefore, that these cases are not in conflict with the doctrine for which we contend, but rather support it.

The case of *Coy v. The City Council of Lyons*, was a proceeding by mandamus to compel the levy of a tax to pay a judgment in favor of the relator. On the hearing of the cause, it was admitted that the corporation possessed the power *by its charter*, to levy a tax of ten mills; that the council had only levied a tax of five mills; and that this was entirely consumed in the payment of the ordinary city expenses, and the interest on the debt. The only defence was, that by the city charter, it was *discretionary* in the city council to levy a tax not exceeding ten mills on the dollar, and that the court did not possess the power to *control that discretion*. But the court held otherwise, and say:

"Where a creditor has obtained a judgment which can only be paid by the levy of a particular rate of tax for a given year, a duty is thereby devolved upon the city council to levy such a rate of tax, *not exceeding the maximum limit*, as will pay off such judgment. That duty results from the plain moral, as well as legal, obligation the city is under to pay its debts; and no discretion within the limits of the performance of that duty can be rightfully claimed by the city council."

In this case, it will be seen, that section 1896 of the

Code of 1851, (which is precisely similar to section 3275 of the Code of 1860), was neither mentioned or relied upon, but the whole case rested on the authority conferred by the city charter, to levy the tax demanded by the relator. It is difficult to perceive, therefore, how the ruling of the court can be held to be in conflict with that of *Clark, Dodge & Co. v. The City of Davenport*, 14 Iowa, 494.

The case of *Porter v. Thomson et al.*, 22 Iowa, 391, was brought under sections 3275 and 3276 of the Code of 1860, which are a part of the general law regulating executions, (and which in the Code of 1851, were numbered 1896 and 1897), charging the defendants, who composed the city council of Dubuque, with the failure to levy a specific tax to pay a judgment of the plaintiff, after being duly requested. The object of the suit was to make the defendants personally liable. A verdict was rendered for the plaintiff, a motion for a new trial was sustained, and thereupon the plaintiff appealed. The case shows that the new trial was granted, for the reason that the jury disregarded the instructions and the evidence, and because the verdict was contrary to both. The court affirmed the judgment of the court below granting a new trial, and in their opinion say:

"These sections are part of the revision, passed in 1860—do not pretend to be, nor are they, in any just sense, *amendments to the charter of any city*, and are therefore not in conflict with section 30, article three of the constitution. *They neither incorporate a city or town, nor do they amend any act, creating a municipal corporation.*"

The court further remark that it was held in *Oswald* v. *Thedinga et al.*, 17 Iowa, 13, "that the officers were individually liable, after a demand to levy the taxes, *if within their power under the law*, and a refusal to comply with

such a demand;" and then, as if to illustrate what was intended by the above remark in the case just cited, observe:

"Of course, as there suggested. *if the taxing power was at that time or for that year exhausted*, there would be no liability for the failure. *For the statute must be construed in connexion with the taxing power of the corporation.* It was not intended that a special levy should be made, which, with prior or existing levies, *would exceed the maximum rate or p rcentage fixed in the charter.*" * * "And in the performance of this duty, the officers are not to neglect the equally imperative duty of providing means to pay the necessary current expenses of the corporation. *And should those expen es absorb the whole taxes which the officers are allowed by law to levy*, they would not be bound to comply with the demand. That is to say, if the actual necessary expenses of running the city government, required a levy of one per cent., (the maximum rate allowed,) there would be no liability for refusing to levy more, nor a failure to set apart a portion of such levy in payment of the judgment."

Now, the most that can be claimed from this decision is, that the officers of a corporation upon which is imposed the duty of levying taxes, may be held personally liable for refusing to levy a tax which they are authorized to impose by the city charter, or within the maximum rate of taxation of such charter. The case presents the question of the personal liability of the officers, and not the power of the corporation to levy the tax; and sustains really our position, that sections 1896 and 1897, of the Code of 1851, confers no power on the corporation to levy a special tax, over and above the maximum rate fixed in the charter, to liquidate any judgment obtained against the corporation. So far from being in conflict with *Clark, Dodge & Co. v. The City of Davenport*, 14 Iowa, 494, it is in entire harmony with, and supports that decision. The main question in the case at bar, is as to the power of the city council to levy the taxes commanded by the writ, and all the decisions of the State court are

uniform, that the taxing power of corporations are limited to the maximum rate fixed in their several acts of incorporations.

If, then, this court adheres to its long settled rule, to follow the decisions of the State courts in the construction of their local statutes, it can come to but one conclusion, which is, that section 1896 of the Code of 1851, confers no authority on the city council to levy the specific tax to pay the said balance of $22,390 75, in addition to the other levies required by the city charter, and that in this respect the mandate of the writ commands more than it is the legal duty of the respondents to perform.

THE SPECIFIC TAX TO PAY THE SEMI-ANNUAL INTEREST ON THE DEBT OF THE CITY CREATED PRIOR TO 1855.

The writ commands the respondents to levy and collect, upon the assessment roll for the year 1867, a special tax to pay the interest on the railway bonds specified in said judgment; and it is stated in the inducement of the writ, that of said judgment of $63,509 68, the sum of $34,000 was for the principal of forty-six bonds issued by the city of Davenport, for subscription to the stock of the Mississippi and Missouri Railroad Company, in the years 1853 and 1854, and that the further sum of $22,390 71 was for interest on said bonds. It is conceded that section eight of the act of 1855, amending the city charter, empowers the city council, "whenever there is a deficiency in the ordinary revenue of the city, after the payment of the ordinary city expenses, to pay the semi-annual interest on the debt already created," (that is, prior to 1855), "to levy a specific tax upon the assessment roll of the current year, to pay said interest." And it is further admitted, that on a proper showing, the relator would be entitled to the aid of the court to compel the levy and collection of such a tax. The question now is, has he made such a

showing; in other words, does it appear from the facts stated as inducement to the writ, that the respondents have refused to levy and collect such a tax? As the writ is the first pleading in the case, and to which the respondents answer, do the facts therein alleged, show that the relator's right thereto is clear? Let us refer to the writ itself, and there we find that the only allegations of fact bearing on this point, are, 1, "That the ordinary revenue of the said city of Davenport have ever since the year 1861, (the year the city first neglected to pay the interest on its bonds,) been consumed in the payment of the ordinary city expenses;" and 2d, "That no interest has been paid on said railway bonds since 1861, and the principal is now due and unpaid." Do these allegations satisfy the legal mind, and show to the court that the specific tax provided for by the statute *have not been levied and collected?* The only positive assertion is, that this interest has not been paid, and from this the court is asked to conclude, not only that the tax has never been levied or collected, but that the city council has refused to levy and collect the same. All that the court can know of the facts of the case, is derived from the pleadings, and from those stated in the writ, it requires no greater stretch of the imagination to infer that the tax has been levied and collected, and is now lying in the vaults of the city's treasury, awaiting an order to pay, than it does to infer that the city officers have neglected or refused to perform a duty enjoined on them by law. If the demand of the writ was merely *to pay* this interest, the averments it contains might be sufficient to maintain its mandate; but we earnestly insist that it is destitute of those allegations of fact, which legally show that the tax has not been levied and collected. Every intendment is against the relator in the statement of his case, and we submit that in this, as in other respects, the writ is fatally defective. *Moses on Mand.*, 206.

These remarks apply with equal force to the claim for interest on the bonds for city improvements issued in 1857, and which constitutes a portion of the said judgment. As to these bonds, there are no allegations that the city officers have refused or neglected to levy or collect the tax, or that the same is not now in the hands of the city treasurer. It is true that the writ avers "that said mayor and aldermen have not, since said interest became delinquent, levied a *general* tax exceeding five mills on the dollar," and that "the relator has made a demand on the mayor and aldermen of the city of Davenport, to levy a tax sufficient to pay said judgment, and they have neglected so to do; but these allegations do not meet the requirements of the law, and must fail to satisfy the legal mind that the respondents have neglected to perform their legal duties.

THE ASSESSMENT AT ITS REAL CASH VALUE.

Under this head, the command of the writ is, that the respondents *cause the real and personal property* within the corporate limits, to be assessed for the year 1868, at its real cash value, and upon such valuation, to cause to be levied a specific tax of five mills over and above the five mills for city purposes. The power of the respondents to obey this order, is denied by the answer or return. The power of the city council in relation to assessments, is defined by the first section of the fifth article of the act of 1851—the original charter—which, as will appear from the citation of the act above, provides that the valuation of the taxable property *shall be ascertained by the assessor*, and only authorizes the city council to correct or equalize any erroneous or injudicious assessment. It thus appears that the city council have no power to *cause* the property to be assessed at its real cash value; that this duty is confided to the assessor; and that the authority of the city

council is confined to correcting and equalizing his assessments; that is, any citizen or resident who is aggreived by the assessment of his property by the assessor, may appeal to the city council, and *then*, that body may review the work of the assessor, and correct any error he may have committed. The meaning of this provision of the statute is well understood. The assessor is an officer of the city, elected by the people, and the council possess no power over him in relation to the valuation of the city property, except to correct his errors, when appealed to, and that can only be done after the assessment is completed. There is, then, no legal warrant for this command of the writ, and the court in requiring the respondents to cause the property to be assssed at its real cash value, ordered them to perform an illegal act.

THE COMMAND TO REPEAT THE LEVIES YEARLY.

The writ commands the respondents to continue the levies yearly, and apply to the payment of the relator's judgment, until the same is paid, the taxes specified therein. If we have established in the course of this argument, that the respondents were empowered by law with no authority to make some of those levies, and that as to others, there was no legal showing to justify or sustain the mandate of the writ, it follows that this command to levy taxes annually and pay the same to the relator, is equally futile and unavailing. But even if we have not established the main proposition, this command is in excess of the legal duty of the respondents so far as it applies to the specific tax to pay the semi-annual interest on the debt of the city created prior to 1855, for the plain and simple reason, that that specific tax could only be levied, after there was a deficiency in the ordinary revenue sufficient to pay such interest. And this is all that we deem it necessary to remark under this head.

THE MANDATE OF THE WRIT TO BE OBEYED AS A WHOLE.

The relator is bound by the mandatory clause of the writ, and the writ must be enforced in the terms in which it is issued. *Chance v. Temple,* 1 Iowa, 179. And if it commands the performance of more than the defendant is compellable to perform; that is, if it exceeds the legal obligation resting upon him, *it cannot be supported as to those acts which he is legally required to perform.* 3 English Law & Equity Rep. 285; 3 Eng. Railw. & Canal cases, 774; 1 Hill, 50; 35 Barb. 110; *The People v. Board of Supervisors,* 18 How. Pr. 152. It is clear from these authorities, as well as on general principles, that the respondents are bound to obey the mandate of the writ *as a whole;* that they could not obey a portion of its requirements, and refuse to obey the others; and that the writ, if illegal as to a part, was illegal as to all. And the respondents having demonstrated that the inducement of the writ did not clearly establish the relator's right to the relief demanded, and that the mandate thereof exceeded the legal duty resting upon them in the premises, they had shown sufficient cause against the writ, and it should have been quashed.

CONCLUSION.

In conclusion, we have only to say: That the only substantial question here involved is, whether the corporation of Davenport, or its officers, under the laws now in force restricting their powers, can levy and collect the taxes, and perform the other acts, commanded by the writ, and not whether the corporation shall be compelled to pay its bonded and other debts, as will probably be insisted by the attorney for the defendant in error? Whether, if the court sustains our view of the law, the relator will be left without any remedy, we do not propose to discuss here, and if we did, the labor would be superfluous. If the law

Supreme Court of the United States.

THE MAYOR AND ALDERMEN OF THE CITY OF DAVENPORT,
Plaintiffs in Error,
vs.
THE U. S. *ex. rel.* THOMAS LORD, EXECUTOR OF RUFUS L. LORD, DECEASED,
Defendant in Error.

Error to the Circuit Court for the District of Iowa.

CASE.

An alternative writ of mandamus was issued by the court below on the petition of Rufus Lord, alleging, that on the 15th of May, 1867, he recovered, by due process of law, a judgment against the City of Davenport, for $63,509.68 and costs, taxed at $30,05 with ten per cent. interest from date of judgment; that the city of Davenport was a municipal corporation, created by the laws of Iowa, whose municipal affairs were managed by a Mayor and Aldermen, who perform all the duties of said corporation in relation to levying and collecting the taxes and paying the debts of the corporation; that execution had been issued on said judgment and retnrned no property found, and the corporation had no property subject to execution out of which said judgment could be collected; that of said judgment $34,000 was for the principal of 46 bonds issued by the city for subscriptions to stock of the Mississippi & Missouri Railroad Company in 1853–4, and $22,390 71 was for interest on them; the balance of said judgment was for interest on certain bonds issued in 1857, under a vote of the people to borrow $200,000

for various city improvements. That the Mayor and Aldermen were empowered by an act of the legislature, 22d Jan., 1855, when there was a deficiency in the ordinary city revenue, after the payment of the ordinary city expenses, to levy a specific tax upon the assessment of the current year, to pay said railroad bond debt and interest. That the ordinary revenue since 1861, the first year the city neglected to pay its interest, had been consumed in the payment of the ordinary city expenses: that no interest has been paid on said railway bonds since 1861, and the principal is now due and unpaid: that the other bonds were issued for city improvements, in 1857, under sec. 7 of said act of Jan., '55, which provided that the city council might borrow money, provided no debt should be created, the yearly interest of which, with the debt previously created, should exceed three-fourths of the ordinary yearly revenue, unless first approved by a vote of the city, which the relator averred had been done in that case.

That the Mayor and Aldermen were authorized to levy a specific tax to pay said railroad bonds and interest, when the ordinary revenue was used for ordinary purposes, which had always been the case, under the amendments of 1855, and a general tax of ten mills on the dollar, and one mill on the dollar as a sinking fund for its bond debt, conferred by the act of Jan., '55, and in the general city incorporation act of 1851, still in force.

That the valuation of the city was five millions in 1867, by assessment, that the assessed value had never exceeded one-half the real cash value; that property in the city was subject to taxation at its real cash value; that the assessment was made by the assessor, and the Mayor and Aldermen were authorized by the charter to correct the assessment when erroneous, and that they have heretofore neglected to perform that duty: That it was the duty of the Mayor and Aldermen to levy a specific tax, since 1861, to pay interest on said railway bonds, which would amount to $7,500, less delinquencies, a tax of one mill as sinking fund, and of ten mills for general purposes, which after devoting five mills for ordinary expenses, would amount to twenty thousand dollars, and upon the real amount subject to taxation sixty thousand dollars: That the Mayor and Aldermen

had not since the interest was delinquent levied a tax for general purposes exceeding five mills: that a demand has been made to levy a tax sufficient to pay said judgment, and they had neglected so to do: That the relator was without other adequate remedy, and the writ commanded the Mayor and Aldermen of said city to levy and collect a special tax to pay interest on the railway bonds, a sinking fund tax of 1 mill, to cause the property of the city to be assessed at its real cash value, and a specific tax above the five mills for general purposes to pay the residue of said judgment, and to continue such taxes yearly, until the whole judgment was paid, or to show cause why not.

The defendants, at the October term, 1867, moved to quash the writ, because the city had no authority to levy a tax of ten mills, or one mill sinking fund; and their motion was overruled. At the May term, 1868, another motion was made to quash the writ and overruled,—no exception taken in either case. Afterwards, at the same term, a return was made, in which law and fact, matters in abatement and matters in bar are mixed up in a maze of disorder.

We shall not, in a printed argument, undertake to review all this disorder and confusion, which the defendants put into their return, but shall content ourself with presenting to the court the real questions raised by the pleadings.

The defendants undertook to set up that the writ was issued in the name of the United States, instead of the President; well! that was amended. The defendant undertook to plead, as matter of fact to be tried by a jury, after two motions to quash the writ overruled without exception, that the writ was misdirected; that it was directed to the Mayor and Aldermen of the city of Davenport, there being no such officers in law or fact; The plaintiff referred to the city charter, which provides that the Mayor and Aldermen shall compose the city council. Now how do we try this question? as matter of law, or as a fact to be made out by an affirmation on one side and a denial on the other? The city charter is a law: the name of the governing officers are fixed by that law; and the court and not the jury tries that law, by demurrer usually, but demurrer is a mere form of getting at the question of law; by looking into the

charter. We had supposed that when an officer of a corporation was required by a writ of mandamus to do an act, the writ was addressed to the officer as such and not by name, and where the office is continuous it is addressed to him by the name of office and served on the particular person holding the office at the time; where a writ is to be directed to a corporate body, it should state accurately the name of the corporate body.

Tapping, page 314, Margin:

When it is directed to an individual holding an office, "if the writ have relation to his office, it should be addressed to him by his official name, as such a course obviates any inconvenience that may arise from the personal change of such office."

Tapping, 317, Margin.

When so addressed, if part of the officers go out, the duty devolves on the successors.

State vs. Common Council of Madison, 15 Wisconsin, 30.

We have an instance of this direction of a writ to an individual by name, instead of the officer in the Magarahan case just decided. Where the court held, that Secretary of Interior Cox, was not bound to obey a writ directed to Secretary Browning.

The city of Davenport is the corporation and corporate name.

Act of 5 February, 1851. The city council consists of a Mayor and Aldermen; same act the city council has authority to levy and collect taxes. The Mayor and Alderman compose the city council; they are the proper persons to whom the writ should be directed.

The counsel makes an unfortunate reference for him, to Van Hoffman, vs. city of Quincy, where the writ is directed to the city of Quincy "*and* its officers," 4 *Wallace*, 535, and city of Galena, vs. Amy, 5 *Wallace* 705, where the writ was directed to "the Mayor and Aldermen of the city of Galena," as it should have been. We know this to be so, because we have examined the writs in the record in each case. The proper direction of this writ was matter of law, to be raised by us on a demurrer; and not by a tender of an issue of fact; the defendants motions were overruled and no exception was

taken. The defendants return of the same thing was held insufficient as to the direction of the writ, and in that the court decided the law correctly.

Having used more words, than we perhaps ought in disposing of this technicality, we will sift out of the return, the only questions which can be raised on the various demurrers. We premise that the alternative writ in this case is based as well upon the execution law of the code, which provides that where an execution has been issued and returned "no property;" the proper officers shall levy a tax sufficient to pay the judgment, as upon the specific provisions of the city charter itself.

The city charter, by the act of 22 Jan., '55, required the city to levy a specific tax to pay the interest on its railway bonds whenever there was a deficiency in the ordinary revenue. The defendants say in bar of the performance, that they were enjoined by a proceeding in the State court, to which the plaintiff was no party. The demurrer to that excuse was well sustained by the court below.

The plaintiff alleged, that the defendants were by the 9th section of the amendment of the charter of 2nd January, 1855, to levy a tax of ten mills on the dollar; that the assessed value of the city was only one half its real value, and when so assessed and a tax of one per cent. levied, there would remain, after paying the ordinary expenses of the city, a sum sufficient to pay the balance of the plaintiff's judgment, and should be applied to it.

The 9th section referred to in the act of 1855, was this: "All the powers in the code for the organization of cities, are hereby conferred on the city of Davenport." The code of 1851, in §657, authorizes the corporate officers to levy and collect on all property, not exempt from taxation, a tax of one per cent on the assessed value thereof. Here then was a plain provision enlarging the powers of taxation from five to ten mills, by an express amendment of the city charter. The defendants aver, that as the code of 1851, provided, that cities created under it, must adopt its provisions by a vote, the 9th section of the amendment of the city charter, giving in express terms the powers conferred by the code, was not a part of the amended charter, until there was

a vote of the people adopting it. That is not the amendment, the amendment says, the powers *are* conferred, not may be conferred, when adopted by a vote. The demurrer was well taken on that part of the defendants answer.

In answer to the allegation that the property of the city was not assessed at its real cash value, as the law required, in code of 1860, §720, and following, which establishes a rule, followed in all amendments. The defendants averred that the assessed valuation had generally been more than one-half its real cash value, and that the city council had always attended to that duty as required by law; this was no traverse of the allegations of the writ. It was an evasion, a subterfuge, and the demurrer was properly sustained to it. There was no traverse of the allegations that the property was undervalued, and that if assessed at its true cash value, and a tax levied of one per cent., the plaintiff's judgment could be paid. Indeed, we may justly call the return, as a whole and in detail, a rambling, discursive, shuffling evasion of the allegations of the writ, and coming under the objections made and sustained by this court in the case of Benbow *v.* Iowa City. It is gravely argued that the judgment should be reversed, because the court, after amendment of the writ, ordered a peremptory writ as prayed for; as if the judgment did not order the peremptory writ, in accordance with the amendment; but this sort of logic is to be expected in an argument which says, that the plaintiffs introductory or endorsement part of his writ, in which is set out the law on which he relies for relief can be traversed as matter of fact and an issue made to a jury to try a question of law.

There is no decision of the Supreme Court of Iowa sustaining the assertion of the counsel for the defendant in their position that the 9th section of the amendment of Jan. 22, 1855, did not confer on the city the power of levying a tax of one per cent. under the code charter. The case of Clark, Dodge & Co. *v.* City of Davenport, 16 *Iowa*, 494, had no such question before it: the question there was on another section of the amendment. The 9th section was not before the court, nor is it alluded to by them.

The last question made by the plaintiff in error is upon the power of the court to compel them to levy a sufficient

tax to pay the plaintiff's judgment under the execution law. That question was settled by this court in a case decided at the last term, Amy *v.* Burlington, and again at this term, Butz *v.* Muscatine, against the plaintiff in error.

This is a delay case. It is brought on a five hundred dollar bond, suspending the execution of a sixty thousand dollar judgment. It is brought here on technical quibbles, and fine spun theories, for the sole purpose of delaying the payment of the judgment. We are not wrong, we trust, in asking the court to put a stop to this way of cumbering the docket with questions already decided, or too plain to require serious examination, by affirming the judgment, with the highest damages allowed by law.

JAS. GRANT,
For Defendant in Error.